No. 80-2

IN T

Supreme Court of

OCTOBER

NEW ORLEANS PU

ver

UNITED STATE

On Petition for a W
The United State
For the Fi

PETITION FO

QUEST

I. WHETHER TH
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ULATION, 41 C.F.R
ITY FOR OFCCP T
AFFIRMATIVE AC
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WHICH HAS NOT
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VIEW OF:

(a) The Fifth C
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surance Com
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ty Mutual
Fifth Circ
No. 11246
C.F.R. §60
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E ACTION OBLI-
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DER NO. 11246
LATIONS PUR-
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D ARE INVALID
ACK THE NECES-
RY NEXUS FOR
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The FPASA, Con-
Delegate Legisla-
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nce Review Provi-
n-Consenting Pri-
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o Use The Procurement
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iness Enterprise 21

ON OF THE COURT OF
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S OF THIS COURT
MANDATE COMPLI-
TH THE FOURTH
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T BEFORE AN ADMIN-
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28 U.S.C.

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40 U.S.C.

40 U.S.C.

41 U.S.C.

41 U.S.C.

REGULA

29 C.F.R.

41 C.F.R.

No.

IN THE
SUPREME COURT OF THE UNITE
OCTOBER TERM, 1981

NEW ORLEANS PUBLIC SERVIC
P

versus

UNITED STATES OF AMER
Re

On Petition for a Writ of Certi
The United States Court of A
For the Fifth Circuit

PETITION FOR CERTIOR

Petitioner, New Orleans Public Serv
tioner" or "NOPSI"), respectfully pra
ance of an order granting *certiorari* to r

OPIN

The opinion of the
Circuit in *United States*
consolidated with *Unit*
Co., ("U.S. v. NOPSI"),
at 638 F.2d 899 and is
The second decision of
for the Eastern Distric
16, 1979, is reported a
ed in Appendix A her
States Supreme Cour
and remanding the fi
ported at 436 U.S. 94
(1978). The *per curiam* d
August 2, 1978, rem
Court is reported at
on the merits of the C
cuit, dated June 6, 197
is reprinted in Appe
mary decision, dated
hearing is reported at
the merits of the Dis
1974, is reported at
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The statute in

The executive
11246, as amend

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whether the pro-
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ntaining specific
Amendment tests.
6th Cir. March 6,

THE WRIT

§60-1.4(e) Is Not
Impose Affirma-
nd To Undertake
The Premises And
Privately Owned
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execute any con-
Government that
nd administrative
Order No. 11246
pite the fact that
act containing the

y Mut. Ins. Co. v. Fried-
981).

spite this Court's ad-
wn, 441 U.S. 281, 99
) ("Chrysler Corp.") that
ve Order program de-
nalysis showing the
perty and Administra-
SA") and the Executive
ions. Id. at 304-305, 60

rror in not examining
nexus between the
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valid In That It Lacks Suf-
red Delegation Of Legisla-

1246 concerns govern-
edures, the legislative
PASA, U.S. v. NOPSI,
h Cir. March 6, 1981),
ited by the principles

Negotiated contracts and competitive bid-
cornerstones of the Federal procurement
-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979),
U.S. 915, 99 S.Ct. 3107, 61 L.Ed.2d 879

atory approach adopted in 41 C.F.R. §60-
ifestly inconsistent with the basic tenets of
procurement process contained in the
t, the regulations, under the holding of the
t, treat consent to contractual obligations
al; however, mutual agreement and volun-
have long been fundamental to the Federal
t process. *Perkins v. Lukens Steel Co.*, 310 U.S.
t. 869, 84 L.Ed. 1108 (1940); *AFL-CIO v.*
Generally, the basic concepts of mutuality
because many companies *seek* the Govern-
ness and, in order to obtain the business,
t to the provisions of the Executive Order
enting regulations. That is not so with re-
PSI. NOPSI has never sought the Govern-
siness and no "contract" between the
t and NOPSI exists.

lations in question, insofar as they are im-
OPSI without its consent, ignore the im-

ve law which deviates not only from Govern-
ract law, but also from well-established com-
contract principles. For example, a funda-
inciple of contract law is the requirement of
of assent and agreement by the parties to the
heir contract. 1 A. Corbin, *Contracts* §3 (1963);
ston, *Contracts* §1 (3rd ed. 1957).

inciple should be applicable to NOPSI unless
has established a different legal standard
eets the due process and equal protection re-
nts of the Fifth Amendment. *Prieve & Sons, Inc. v.*
ites, 332 U.S. 407, 68 S.Ct. 123, 92 L.Ed. 32
The regulation contained in 41 C.F.R. §60-
a clear and unwarranted attempt to create law
contradicts established common law and
nent contract law principles. The OFCCP lacks
ority and the power to enact such law. *Ernst &*
Hochfelder, 425 U.S. 185, 96 S.Ct. 1375, 47
668 (1976).

dingly, the FPASA does not supply the neces-
utory nexus to legitimize 41 C.F.R. §60-1.4(e).
tion and consent have always been the guiding
es of Government contract law. For these

stantive law does not have the force and ef
United States v. East Texas Motor Freight System, In
179 (5th Cir. 1977). An administrative ag
authorized to issue a regulation in excess of
authority. *Peters v. Hobby*, 349 U.S. 331, 75 S.
L.Ed. 1129 (1955).

Executive Order No. 11246 does *not* prov
equal opportunity provisions shall be consi
included in every Government contract.

An early equal opportunity executive
9001, 3 C.F.R. 1054-1056 (1938-1943 Co
contained a provision that "all contracts sh
ed to incorporate by reference" the nondis
clause. That approach was quickly abandon
utive Order No. 9346, 3 C.F.R. 1230
Compilation). No subsequent equal opport
utive order has contained a provision simil
contained in Executive Order No. 9001. Th
highly significant.

The regulations contained in 41 C.F.R. §§
follow the language of Executive Order N
cept that 41 C.F.R. §60-1.4(e) provides fo

II.

The Affirmative Action Obligatio utive Order And Regulations Vi Amendment

The Fifth Circuit held that Execut 11246 and its implementing regulation that NOPSI is bound by the affirmati sions contained therein. 638 F.2d at Court recently decided a case that seri that holding. *Fullilove v. Klutznick,* ____ S.Ct. 2758, 65 L.Ed.2d 902 (July 2, 19

In *Fullilove,* this Court addressed a tional attack on the minority set-aside p Public Works Employment Act of 197 for the Court, Chief Justice B emphasized that the question before volved a congressional enactment an occupied a special constitutional positio enacting limited measures to remedy ef crimination. *Id.,* 100 S.Ct. at 2771-27

The special constitutional position of enforcement of the Thirteenth, Fou

dealing with an act of
2784. Justice Powel
governmental body th
scious remedy must
make findings that
legal discrimination."

The Supreme Cour
proper authority to
violations and that C
the determination th
tices, when applied t
petuate the effects
S.Ct. at 2775.

The Executive Or
cannot withstand scr
of *Fullilove*. First, to h
ity to impose a mino
to identified discrimi
utive has similar auth
cupy the unique con
gress occupies with r
nation. For that rea
determine the statut

visions prohib
contained in Ti
the Equal Emp
discussion *infra*
Executive is w
ity and sex co
has not been
Paving, Inc. v. Ja
10, 1980); *Peri*
Authority, C.A
1980), reprint
dix F.

Even assum
only, that the
pose minority
not and has
absent a prio
statutory viol
Steelworkers v.
L.Ed.2d 480 (
mination gen
ties like NOP
tices on the b
or color. Spe

program to eliminate employment discri
the Federal Government and by those
from Government contracts." *Chrysler Cor*
U.S. at 304, 60 L.Ed.2d at 226.

Notwithstanding the recognition by thi
"[t]he origins of congressional authority f
Order 11246 are somewhat obscure," *Id*
L.Ed.2d at 226, the Fifth Circuit refused to
significance to this Court's instruction tha
That no definitive decision had properly
Executive Order No. 11246 in terms of
requisite statutory nexus that would valid
utive Order and the regulations promul
ant thereto. Hence, the question that th
undecided in *Chrysler Corp., supra,*

* * *

". . . whether Executive Order 11246
is authorized by the Federal Property
istrative Services Act of 1949, Title
the Civil Rights Act of 1964, The Ec
ment Opportunity Act of 1972, or so
eral notion that the Executive Orde

dated the Executive Or
supra, 638 F.2d at 905.

In light of *Chrysler Corp.*
clearly unwarranted and
requisite statutory nexu
Fifth Circuit thereby co

A. By Enacting the F
Legislative Author
Affirmative Actio
sions On Non-C
prises.

This Court has squar
holding the validity of t
initiated pursuant to Ex
delegation of legislative
dicta. *Chrysler Corp., supra.*
those cases failed to ma
judicial scrutiny normall
delegation of legislativ
tutionally protected righ
Elroy, 360 U.S. 474, 79
(1959). The legislative
shows that in 1949 C

ment an ec
procureme
nonperson
Serv. at 3

The section
debate on the
action provisio
pertinent part,

> "The Pres
> directives,
> as he shall
> *said Act*, . .

In Title III
petitive biddi
government p
However, if it
certain supplie
ty company),
negotiated by th
41 U.S.C. §25
the propositio
tion of the A
process, at th

t "legislative senti-
Order program sur-
ke Title VII the ex-
s Public Service, Inc.,
as held that the fail-
tion to remedy the
a poor indication of
en, 396 U.S. 168, 90
Furthermore, con-
ive process, it is un-
proval" could "rati-
t. Ins. Co., supra, 639

n of the President's
der No. 11246 is of
whether the Presi-
gation of the Execu-
ows that opponents
Order program have
empts to pass legis-
zing the Executive
to limit its scope. As
11(b), granting the
g Government con-

ent Power To Use The Pro-
e A Social Program On A
siness Enterprise.

at there is specific stat-
or Executive Order No.
ed whether the Execu-
ent powers authorize
e Order. *Chrysler Corp.*,
.Ed.2d at 227. No such
abling the Executive to
licy exists. Mr. Justice
Co. v. Sawyer, 343 U.S.
1153, 1167 (1952), ex-
on limits [the Presi-
ing process to the rec-
ise and vetoing of laws

ional framework, the
t has developed. Chief
cuit Justice, held that a
e to accomplish the ob-
nined "that there is a
where it is necessary to

ted States v. Tingey, 30 U.S. (5 Pet.) 115, 8
31), the Court faced the question of the
idelity bond which did not conform to stat-
ch a Navy disbursing officer and his sure-
rced to execute. Justice Story had no diffi-
g the threshold question that the United
ssed the capacity to contract absent specific
ovision therefor. 30 U.S. (5 Pet.) at 127-
at 71.

vever, teaches a more important lesson re-
question at issue here. The Court in *Tingey*
e bond was invalid because it had been
r duress. Justice Story's holding in *Tingey*
d the basic question regarding the sep-
overnmental powers before this Court:

* * *

s no pretense [in this case], then, to say
as a bond voluntarily given. . . . It was de-
of the party upon the peril of losing his
. . It was plainly, then, an illegal bond; for
r of the government has a right by color of
e to require from any subordinate officer,
lition of holding office, that he should exe-

ert. den., 443 U.S. 915, 99 S.Ct. 3107, 61 L.Ed.2d
79).

e extent that the Fifth Circuit's holding relies
uch inherent authority of the President under
curement statute, it conflicts with the consis-
ldings of this Court and must be set aside.

IV.

**e Opinion Of The Court Of Appeals Conflicts
th The Decisions Of This Court Which Man-
e Compliance With The Fourth Amendment
rrant Requirement Before An Administrative
ency Of The Federal Government May Validly
nduct A Non-Consensual Inspection Of The
ilities, Books And Records Of A Privately-
vned Corporation.**

Court's decision in *Marshall v. Barlow's, Inc.*, 436
7, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), is dis-
e of the issues in this case concerning the pri-
nd the security of private commercial establish-
against arbitrary invasions by governmental
s.

purportedly promulgated pursuant to Execu
No. 11246 [more specifically section 202(5) o
utive Order], also permit inspections to det
compliance *vel non* with the affirmative actio
of the Executive Order. Both inspection pro
similar; both specifically do not require a s
rant or other process as a predicate to entry
the statute or Executive Order, if valid
authorizing inspection fails to provide
enforcement procedure, access without co
be ordered only in accordance with the Fou
ment. *Colonnade Catering Corp. v. United States,*
77, 90 S.Ct. 774, 25 L.Ed.2d 60, 64 (1970). A
tive searches must be authorized by law. T
tent with its prior arguments, NOPSI co
Executive Order No. 11246, through its ow
plementing regulations, cannot authorize
trative search for the simple reason that
the FPASA has not delegated to the Execu
or implied authority to permit administrat
to test compliance with federal procur
cedures.

The fear of unchecked administrative fr
pelled this Court to hold OSHA unconstit

NOPSI's premises. Yet it is well settle
rant Clause of the Fourth Amendmen
posed administrative inspections for
regulatory statutes or procedures. *Ca*
Court, 387 U.S. 523, 87 S.Ct. 1727,
(1967); *See v. City of Seattle*, 387 U.S. 54
18 L.Ed.2d 943 (1967). *See also, Air Pollu*
v. Western Alfalfa Corp., 416 U.S. 861, 9
L.Ed.2d 607 (1974); *G.M. Leasing Corp. v*
U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530
cisions rest upon the proposition tha
sensual administrative inspections
premises are authorized, such inspect
accomplished upon presentation of
upon satisfaction of a flexible probe
ard." *Usery v. Centrif-Air Machine Co.*,
961 (N.D. Ga. 1977).[2]

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2 *Colonnade Catering Corp. v. United States*, 397
25 L.Ed.2d 60 (1970) and *United States v. Bis*
S.Ct. 1593, 32 L.Ed.2d 87 (1972), did not ove
See but provided a limited exception to the w
highly regulated industries which have been
close governmental supervision not applic
Barlow's, Inc., supra, 436 U.S. at 312-314, 5

This Court obser
entitlement to inspe
"administrative pro
"specific evidence of

> "a showing that
> istrative standa
> tion are satisfi
> [establishment]
> supra, at 538,
> *low's, Inc., supra,*
> 316.

In order for a mag
ministrative search,
concluding that the
scription of the pa
presentation of fact
"program" and the
proposed inspectio
ter. *Marshall v. Barl*
56 L.Ed.2d at 318
lines, Inc., 437 F.Sup
F.2d 12 (7th Cir. 1

ableness in cl
other.

Yet, distric
to justify a v
shall v. Chrom
Wis. 1977), *a*
den., 444 U.S
posed search
to achieve sig
occupational
working and
at 332, and M
(N.D. Ala. 19
where it was
to base his d
the iron and
than the inci
to be search
OSHC 1486

In order t
the discreti
closely scrut
Metals Compa

process." *Marshall v. Weyerhaeuser C*
1920, 1926 (D.N.J. 1978) (Empha

It is not the function of the appellate
hearing for probable cause *ab initio*. Th
unconstitutional voids is not at an *ex po*
remand after appeal.

For the reasons stated above, the i
visions of the Executive Order, the in
ulations and judicial enforcement p
not undermine the jealously-guarde
the Fourth Amendment. According
that the Executive Order and its impl
tions impute NOPSI's consent to a
search, they violate NOPSI's Fourth A
antees. Moreover, whether or not t
procedures herein comply in the
Amendment requirements, the reco
showing as to the reasonableness of
ministrative inspection and, theref
appeals erred in not dismissing the

CO

For the foregoing re
tion for Writ of Certi

Respe

MICH
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New O

Couns
for

OF COUNSEL:

MILLING, BENSON,
HILLYER, PIERSON

I hereby certif
ing Petition for
Court of Appea
upon the follow
by depositing sa
addressed, in th
June, 1981:

Solicitor
U.S. Dep
Washing

Mr. Dav
U.S. Dep
Washing

Mr. Joh
U.S. De
Washing

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Order

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rmed on the
peals for the
F.2d 459 (5th
Court granted
i, vacated the
emanded for
. *Barlow's, Inc.*,
d 305 (1978).
.Ct. 2841, 56
subsequently
nded for con-
preme Court.

motion for the entry of judg-
defendant filed a motion to
ent on the pleadings and/or
The plaintiff also filed a re-
tion.

tion is that this court is with-
liction, citing *Marshall v. Gib-*
668 (5th Cir. 1978). A motion
ect matter jurisdiction may be
interested party. *Burks v. Texas*
Cir. 1954). Nevertheless, de-
merit.

s Products was that the Secre-
pted to bring suit to enforce a
ional Safety and Health Act of
) (1976). The court held that
hich conferred authority upon
uit in the United States district
se, the Attorney General has
of the United States. Jurisdic-

es. 584 F.2d at 676 n.11. Defendant's
s for lack of subject matter jurisdic-
denied.

Remand

t contends that since the order of the
ted the entire decision of the court, all
o reconsideration on remand. The de-
randum argues, "[I]t is incumbent
to review its *entire* decision in light of
he United States Supreme Court and
." (emphasis in original). I agree with
would focus on a different portion of
rtion: the duty of the court is "to re-
ecision *in light of the mandates of the United*
t and the Fifth Circuit." (emphasis added).

ave cited the well-reasoned approach
Appeals for the Sixth Circuit in *Mefford*
.2d 748 (1967):

nand of a case after appeal, it is the
ower court . . . to comply with the

manded for a specified purpose, any proceedings inconsistent therewith is error . . . .

83 F.2d at 758.

The Supreme Court and the Fifth Circuit specifically remanded to this court for reconsideration in light of the recent case of *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). Thus, it is only with respect to that decision that I must reconsider the merits of the case.

Briefly, the *Barlow's* case, considered the validity of warrantless searches of commercial premises pursuant to the Occupational Safety and Health Act of 1970 ("OSHA"). The court held that such warrantless searches violated the fourth amendment's ban against unreasonable searches and seizures. *See* U.S. Const. amend. IV. Although defendant in the instant case argued on its appeal to the Fifth Circuit that any inspection of its records conducted pursuant to the Rules and Regulations would violate the fourth amendment, such an argument was not initially presented to this court, nor would it affect the findings of fact and conclusions of law constituting the original opinion of this

cluding findings of fact 1–37 and conclusions of
1–33,[3] subject to the merits of defendant's fo
amendment claim.

3. The Impact of the Fourth Amendment on the I
and Regulations

Sections 201 and 206(a) of the Order provide:

> Sec. 201. The Secretary of Labor shall be
> responsible for the administration of Parts I
> and III of this Order and shall adopt such rule
> and regulations and issue such orders as h
> deems necessary and appropriate to achiev
> the purposes thereof.
>
> . . . . . .
>
> Sec. 206(a). The Secretary of Labor ma
> investigate the employment practices of an
> Government contractor or subcontractor, o
> initiate such investigation by the appropriat
> contracting agency, to determine whether o

---

affirmative action program and be exposed to possible reve
crimination suits. I agree with plaintiff that since the issue
stantive compliance has been severed from the coverage iss
inappropriate to consider such an argument at this time. I

not the contractual prov
Section 202 of this Order
Such investigation shall
accordance with the proced
the Secretary of Labor . .

Exec. Order No. 11,246, 30 Fe

Section 60-1.43 of the Rules
ments Sections 201 and 206(a)

Each prime contractor
shall permit access durin
hours to its premises for t
ducting on-site complianc
specting and copying such
counts, and other material
to the matter under inves
nent to compliance with
rules and regulations pro
thereto by the agency, or

41 C.F.R. §60-1.43 (1978). A
authorizes the Secretary tocon
critical to recognize that in im

Rules and Regulations, *see* 41
authority to enter an emp
without a warrant in the fa
to comply with Section 60-

The Ninth Circuit Court
with a similar statute in *Mid*
v. Kirkemo, 533 F.2d 455 (9th
eral law, certain agricultur
are exempt from regulatio
merce Commission ("I.C.C.
(1970). Another statute pr
have access to inspect the
ciations claiming exemptio
49 U.S.C. §320(g) (1976).[4]

Midwest Growers Coop
west"), an association cla
U.S.C. §303(b)(5), refused
Kirkemo, a transportatio
access to its records to inv
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4 The statute provides in per
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enter premises in order to effect a

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5 *Camara* involved a search pursuant to S
ing Code of the City of San Francisco, w

> Authorized employees of the City d
> agencies, so far as may be necessary f
> of their duties, shall, upon presentati
> tials, *have the right to enter*, at reasonab
> ing, structure, or premises in the C
> duty imposed upon them by the Mu
> (emphasis added); *see* 387 U.S. at 52

The inspection in *See* was conducted purs
of the City of Seattle Fire Code, which

> It shall be the duty of the Fire Chief
> *enter* all buildings and premises, exc
> dwellings, as often as may be necessa
> ascertaining and causing to be corre
> liable to cause fire . . . .
> (emphasis added); *see* 387 U.S. at 54

The forcible entry in *Colonnade Catering*
§5146(b) and 26 U.S.C. §7606, which giv
Secretary of the Treasury or his deleg
premises of retail dealers in liquors. Th

> The Secretary or his delegate *may*
> hours the premises . . . of any deale
> inspecting or examining any records
> required to be kept by such dealer u
> and any distilled spirits, wines, or b
> such dealer on such premises.

26 U.S.C. §5146(b) (1976) (emphas

concluded that an administ
plished through a warrant
agency is granted such a
While Section 320(g) prov
have access to the busines
expressly grant authority
ises without consent.

The court in *Midwest Gro*
Big Valley that in order to e
must obtain an injunction
ing carrier to comply with
I.C.C. v. Beehive State Agricul
802 (10th Cir. 1978). The
the injunction procedure
amendment. The court
amendment standard of
conducting an adversary
may be issued. 533 F.2d a

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26 U.S.C. §7606 (1976) (em
73-74, 90 S.Ct. 774.

The search in *Biswell* was condu
ity of The Gun Control Act of
vides:

> The Secretary *may enter* du
> ises . . . of any firearms or

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States v. Mor-
94 L.Ed. 401
ng, 327 U.S.
FTC v. Ameri-
68 L.Ed. 696
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corporations can claim no
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hey are endowed with
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t allows them the privi-
in interstate commerce.
nment often carry with
neasure of regulation. . . .
encies have a legitimate
nselves that corporate be-
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vernmental investigation
tters may be of such a
nd so unrelated to the
ler inquiry as to exceed the
r. But it is sufficient if the
e authority of the agency,
oo indefinite and the infor-

rton Salt Co., 338 U.S. 632, 651-53, 70
369, 94 L.Ed. 401 (1950) (citations

relies ultimately on the power of a
trict court to issue an injunction com-
e with its terms. *See* 5 U.S.C. §555(d)
ne court's review is a company's pro-
n overbroad administrative order to
:

demand to inspect may be issued
y, in the form of an administra-
na, it may not be made and en-
e inspector in the field, and the
party may obtain judicial review
nableness of the demand prior to
nalties for refusing to comply.

, 387 U.S. at 544-45, 87 S.Ct. at 1740.
erlying subpoena satisfies the fourth
ndard, any injunction to enforce its
ell. In the case at bar, the Director and
cies are not directly given subpoena or
they are merely given a right of access

ccess would transgress its fourth amendment protec-
on. Such an assertion cannot be maintained under the
oregoing precedents.

Since the Ninth Circuit's ruling in *Midwest Growers,* he Supreme Court decided *Almeida-Sanchez v. United ates,* 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 973) and *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 98 Ct. 1816, 56 L.Ed.2d 305 (1978). In both of those ses, like the other Supreme Court predecessors dis-ussed in *Midwest Growers,* the statutes gave the in-pecting agency the authority to search without a war-nt.* Since my instruction on remand was to consider he case at bar in light of *Barlow's,* I will confine my ttention to that decision.

Barlow's involved an attempted search under Section (a) of OSHA, which provides:

Almeida-Sanchez involved a search pursuant to a provision of the nmigration and Nationality Act, 8 U.S.C. §1357(a)(3) which rovides:

> Any officer or employee of the [Immigration] Service authorized under regulations prescribed by the Attorney General shall have power *without warrant*—
>
> . . . . .

(a) In order to carry out the purposes of this chapter, the Secretary . . . is authorized—

(1) *to enter without delay* and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

29 U.S.C. §657(a) (1976) (emphasis added). An O inspector entered the premises of Barlow's, Inc. to duct a search of the working areas of the busines health and safety violations. The president and eral manager of the company, Mr. Barlow, refus allow the inspector admission without a warran

District of Idaho to admit the ins
dent again refused to admit the ins
suit to enjoin the warrantless sear
mitted by OSHA. A three-judge
fourth amendment requires a w
search, held the statute unconstitu
injunction against searches and in
to the statute.

On appeal to the United States
Secretary used Section 657(a) as t
duct the search. That section speci
retary the power to enter busines
retary argued that warrantless s
contemplated by OSHA were reas
and *Colonnade Catering*. Those case
tion to the warrant requirement n
"pervasively regulated business[e
at 316, 92 S.Ct. 1593, or for "clos
tries "long subject to close sup
tion," *Colonnade Catering*, 397 U.S.
777. The Secretary did not rely o
lations promulgated pursuant to
Rules and Regulations in the insta

§1903.4 (1978).[8] Moreover,
not rely on the district court
tor that was actually issued
Court stated:

> The injunction enter
> court], however, shoul
> forbid the Secretary f
> spection authority con
> to regulations and judi
> the Fourth Amendme
> did not address the is
> for inspection that was
> the functional equival
> the Secretary has lim

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8 The regulation provides:

> Upon a refusal to permi
> Health Officer, in the exer
> enter without delay and at r
> employment or any place th
> records, or to question any
> agent, or employee, in acco
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employer to submit to inspection o
ords is acceptable under the four
administrative procedure should
ently.[9]

For all of these reasons, I find t
11246, as amended, and the rules a
Secretary of Labor promulgated
ally 41 C.F.R. §§60-1.26 and 60-1.
fourth amendment guarantee a
searches and seizures as interpre
Court in *Marshall v. Barlow's, Inc.*, 4
1816, 56 L.Ed.2d 305 (1978).

By bringing its suit in this cour
compel NOPSI to comply with the
the Rules and Regulations, the U
plying correctly with the regulati

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9 It might be argued that the administr
type of impartial judicial review of the a
quest for access contemplated by the C
failure to comply with any final adminis
it sanctions within the power of the S
mediate cancellation of the company's
ment of the company from further cont
(1978). The question has only peripher

a district court proceedin
brought without first atter
ministrative action. 41 C.
My original order in this
failing and refusing to con
11246, as amended, and
issued pursuant thereto.
73-1297, slip op. at 44 (E.D
theless, the Fifth Circuit, o
case, felt that an injunction
time. I therefore restate th
and adopt it as part of my

> [T]he appropriate go
> agency — whether OF
> ceed by administrat
> NOPSI's compliance
> Order. . . . [O]ur deci
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Cir. 1977, 553
Light Co., 5 Cir.
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granted the injunctions. On
executive order and the regu-
nally authorized and therefore
o the defendant companies. We
nies' fourth amendment argu-
injunctive relief granted by the
relying on the declaratory force
e good faith of the parties, we
s to comply voluntarily and
ment to seek through adminis-
resolve any remaining issues
ne companies' records.

granted certiorari and vacated
sideration in light of *Marshall v.*
36 U.S. 307, 98 S.Ct. 1816, 56
subsequent to this Court's deci-
shadows on the rationale under-

cause we disagree in part with the
must vacate their orders and re-
ndings.

I.

s raises an initial question, ignored
hether the two orders issued by the
nal decisions within the meaning of
he decisions are not final, we do not
ver these appeals.[2] Although the
s in these two cases differ some-
f the two dispositions are the same.
rized the United States to proceed
ntive action to force the companies
e executive order and the regula-
also concluded that the companies
rth amendment defenses to the pro-
nd that their refusal to allow the in-
the executive order. Neither court
ons sought by the government. Like
st decision, they were willing to rely
aratory force of their decisions and

pecialized routes of appeal that are plainly
5 C. Wright, A. Miller & E. Cooper, Federal

n the good faith of the parties. Both courts retained risdiction, however, in the event that enforcement of eir decisions became necessary.[3]

Gillespie v. United States Steel Corp., 1964, 379 U.S. 148, 5 S.Ct. 308, 13 L.Ed.2d 199, furnishes the analytical amework for determining whether these orders are nal within the meaning of §1291. As that case points ut, "a decision final within the meaning of §1291 does ot necessarily mean the last order possible to be made a case". *Id.* at 152, 85 S.Ct. at 310. Thus, although the ithholding of injunctive relief and retention of jurisiction by the district courts in these cases makes it posible that they will be called on to issue another order to nforce their decisions, that fact alone is not dispositive on the issue of finality. *Thoms v. Heffernan*, 2 Cir. 973, 473 F.2d 478, *vacated on other grounds*, 1974, 418 U.S. 08, 94 S.Ct. 3199, 41 L.Ed.2d 1154:

Rather, *Gillespie* dictates that we give the finality requirement a "practical rather than a technical construction" and that the chief countervailing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying jus-

tice by delay on the other". 379 U.S. at 152-53 (quoti
Cohen v. Beneficial Industrial Loan Corp., 1949, 337 U.S. 5
546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 and *Dickinso*
Petroleum Conversion Corp., 1949 , 338 U.S. 507, 511,
S.Ct. 322, 94 L.Ed. 299). With these considerations
mind, we conclude that the orders are sufficiently fi
to vest us with jurisdiction.

Our review of these orders does not raise the us
problems attending piecemeal review because it can
labelled "piecemeal" only in a distorted sense of
word. The orders would be undeniably final if the co
had either granted or denied the injunctive relief as
for by the government instead of retaining juris
tion to issue injunctions later if needed. The dist
courts otherwise fully decided every issue presen
including the two central issues before us now. Th
two substantive issues have formed the core of th
cases from their inception, are the same issues we f
when the cases were first appealed to us, and are
same issues on which the Supreme Court granted
tiorari before vacating our first judgment. T
appeals are in effect a continuation of the first app
To resolve these issues now would impose no fur
inconvenience on the progress of this litigation. Inc

will apply to the district courts fo
relying on their prior decisions, th
junctions that will be clearly a
U.S.C. §1292(a)(1). The issues
better suited for appellate review
but the parties will have suffere
that would attend this unne
ministrative and judicial resource
usual procedural history of these
fear that our decision to hear th
the door to a host of other ap
"piecemeal".[4]

Liberty Mutual Insurance Co. v. W
737, 96 S.Ct. 1202, 47 L.Ed.2d 43
the government, is inapposite. Ap
because the district court had
mary judgment, deciding for the

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4 The unusual procedural history o
guishes them from *Garza v. Smith*, 5 Cir.
case, this court dismissed, for lack of
three-judge district court that granted
held injunctive relief, choosing instead
event that injunctive relief would later
cases come to us in a different posture,
resent, in essence, rehearings of case

issue of liability but leaving
the relief sought. That is
cases. The district courts c
ing the appropriate relief.

I

After the decisions in th
remanded to this Court, th
opinion in *Chrysler Corp. v. B*
S.Ct. 1705, 60 L.Ed.2d 208
argue that the case cast
authorization we found fo
ler therefore undermines o

Chrysler Corporation
Office of Federal Contr
(OFCCP), the agency cha
pliance with E.O. 11246.
tion to block that agency'
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5. The district courts did not ad

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C.F.R. §60-1.4(e) (1979).[9] Our co
validity, however, remains the sa
lishes two prerequisites for a regu
force and effect of law. The promu
lation must satisfy the procedura
posed by Congress, and, as stated
within the contemplation of some c
gated authority. Unlike the regu
Chrysler, the promulgation of 41
(1979) did comport with the provis
ministrative Procedure Act, 5 U
analysis turns then to whether th
templated by the sources of congre
cite for it.

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9 41 C.F.R. §60-1.4(e) provides:

Incorporation by operation of the Order.—
Order, the equal opportunity clause
to be a part of every contract and subc
the Order and the regulations in this
a clause whether or not it is physic
such contracts and whether or not th
the agency and the contractor is wr

10 Section 4 requires that notice of pro
in the Federal Register no less than 30 da
date, and that interested parties be give

That analysis begins wit
ready reached: *Chrysler* do
ing that E.O. 11246 is itse
sionally delegated author
short step to the conclusio
within the contemplation
The order states that,
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the party contracting wi
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groups. The regulation m
is deemed a part of all go
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clause is physically incor
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stated in *United States v. Ne*
F.2d at 465, the regulati
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436 U.S. at
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ination, it is then the task of
ure the specific search that is
fourth amendment test of
v. Municipal Court, 1967, 387
t. 1717, 1735-36, 18 L.Ed.2d
elements of such an inquiry
ith the nature and circum-
is desired, although *Barlow's*
nce to the district court. One
whether the proposed search
and a second is whether it is
436 U.S. at 323, 98 S.Ct. at
A third element should be an
agency chose to initiate this
rch will be reasonable if based
lence of an existing violation,
onable legislative or adminis-
onducting an . . . inspection
ct to a particular [establish-
20-21, 98 S.Ct. at 1824, 56
Camara, 387 U.S. at 538, 87
at 940), or (3) a showing that
o an administrative plan con-

ay find other questions relevant to
of the proposed search under the
but these three elements, at least,
ıd no indication in the record, how-
rict courts considered any of the
e first two are questions of law that
appeal. Our first opinions in these
concluded that E.O. 11246 and the
ıder are statutorily authorized. *New*
5 Cir. 1977, 553 F.2d 459; *Mississippi*
r. 1977, 553 F.2d 480. The inspec-
are clearly within that statutory
y, because the searches are restrict-
n solely of business records to test
ıe affirmative action program, they
d in scope. But the third inquiry is a
ınd the record does not provide us
ormation to reach a decision our-
ıerefore remand to the district court
ation.[13]

urt finds that the requested searches
ı amendment standards of reason-
above, there will be no further ob-
PSI and MP&L can raise, and the dis-

orts to conduct a compliance review of NOPSI date rom 1969, and this action began in 1973. NOPSI's *fides* nay be as *bona* as when we first relied on it in our June 1977 opinion, 553 F.2d at 474-75, but the time has come o bring this litigation to a conclusion, without further opportunity for delay.

The Court has considered all of the contentions the appellants have argued orally or by brief, including the contentions not discussed in this opinion.

We VACATE the orders entered by the district courts and REMAND these cases for further proceedings consistent with this opinion.

APPENDIX C

Constitutional Provisions, Statute, Executive Order and Regulations Involved

Fourth Amendment to the Constitution of the United States

scribing the place to be searched, and the persons
things to be seized.

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital
otherwise infamous crime, unless on a presentmen
indictment of a Grand Jury, except in cases arisin
the land or naval forces, or in the Militia, when in ac
service in time of War or public danger; nor shall
person be subject for the same offence to be twice
in jeopardy of life or limb; nor shall be compelled in
criminal case to be a witness against himself, nor be
prived of life, liberty, or property, without due pro
of law; nor shall private property be taken for pu
use, without just compensation.

40 U.S.C. 486

(a) The President may prescribe such policies
directives, not inconsistent with the provisions of
Act, as he shall deem necessary to effectuate the pr
sions of said Act, which policies and directives
govern the Administrator and executive agencie

the executive agencies in the dev
accounting systems, and approv
deemed to be adequate and in
scribed principles and standards.
General Accounting Office shal
erty accounting systems as are e
utive agencies to determine the
with prescribed principles and st
systems, and the Comptroller G
the Congress any failure to co
ciples and standards or to adequa
erty.

(c) The Administrator shall
tions as he deems necessary to e
under this Act, and the head of
shall cause to be issued such or
such head deems necessary to
tions.

(d) The Administrator is aut
to authorize successive redeleg
transferred to or vested in him
the authority to issue regulatio

(e) With respect to a
vested in the General Se
Administrator by this A
direct the undertaking o
eral Services Administr
organization therein wh
lish; or (2) designate a
agency to perform such f
nate and authorize any
form such function; or
ance by any combinatio
Any designation or assig
tion of authority to an
this section shall be mad
executive agency concer
President.

(f) When any execut
eral Services Administr
zations thereof) is auth
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the Administrator may,
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fer of appropriate pers
allocated funds of the

tion transfer
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(h) The
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(i) If aut
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for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this non-discrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and

orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided,* however, That in the event the contractor becomes involved in, or is threat-

ened with, litigation with a subcontractor or ve
a result of such direction by the contracting ager
contractor may request the United States to ent
such litigation to protect the interests of the
States."

Sec. 203. (a) Each contractor having a c
containing the provisions prescribed in Secti
shall file, and shall cause each of his subcontrac
file, Compliance Reports with the contracting
or the Secretary of Labor as may be directed. C
ance Reports shall be filed within such times ar
contain such information as to the practices, p
programs, and employment policies, program
employment statistics of the contractor and ea
contractor, and shall be in such form, as the Se
of Labor may prescribe.

(b) Bidders or prospective contractors or s
tractors may be required to state whether the
participated in any previous contract subject to t
visions of this Order, or any preceding similar
tive order, and in that event to submit, on be
themselves and their proposed subcontractors
pliance Reports prior to or as an initial part of t
or negotiation of a contract.

(c) Whenever the contractor or subcontract
collective bargaining agreement or other con
understanding with a labor union or an agenc
ring workers or providing or supervising app

ship or training for such workers, the Complian
port shall include such information as to such
union's or agency's practices and policies affectin
pliance as the Secretary of Labor may prescrib
vided, That to the extent such information is with
exclusive possession of a labor union or an agen
ferring workers or providing or supervising ap
ticeship or training and such labor union or a
shall refuse to furnish such information to th
tractor, the contractor shall so certify to the con
ing agency as part of its Compliance Report an
set forth what efforts he has made to obtain such
mation.

(d) The contracting agency or the Secreta
Labor may direct that any bidder or prospectiv
tractor or subcontractor shall submit, as part
Compliance Report, a statement in writing, sig
an authorized officer or agent on behalf of any
union or any agency referring workers or provid
supervising apprenticeship or other training,
which the bidder or prospective contractor deal
supporting information, to the effect that the si
practices and policies do not discriminate o
grounds of race, color, religion, sex, or national
and that the signer either will affirmatively coo
in the implementation of the policy and provisi
this Order or that it consents and agrees that r
ment, employment, and the terms and conditi
employment under the proposed contract shal
accordance with the purposes and provisions

Order. In the event that the union, or
refuse to execute such a statement, the
port shall so certify and set forth wh
been made to secure such a statemen
tional factual material as the contracti
Secretary of Labor may require.

Sec. 204. The Secretary of Labor
deems that special circumstances in th
est so require, exempt a contracting a
requirement of including any or all of t
Section 202 of this Order in any specif
contract, or purchase order. The Sec
may, by rule or regulation, also exemp
of contracts, subcontracts, or purch
whenever work is to be or has been pe
the United States and no recruitment c
in the limits of the United States is i
standard commercial supplies or raw r
volving less than specified amounts of
fied numbers of workers; or (4) to the
involve subcontracts below a specified
tary of Labor may also provide, by rul
order, for the exemption of facilities
which are in all respects separate a
activities of the contractor related to
of the contract: *Provided*, That such a
not interfere with or impede the eff
purposes of this Order: *And provided fu*

absence of such an exemption all fac
covered by the provisions of this Orde

SUBPART C — POWERS AND DUT
SECRETARY OF LAB
CONTRACTING AG

Sec. 205. Each contracting agency sh
ly responsible for obtaining compliance
regulations, and orders of the Secretary
respect to contracts entered into by suc
contractors. All contracting agencies sha
the rules of the Secretary of Labor in dis
primary responsibility for securing co
the provisions of contracts and other
terms of this Order and of the rules, re
orders of the Secretary of Labor issued p
Order. They are directed to cooperate w
tary of Labor and to furnish the Secr
such information and assistance as he
the performance of his functions und
They are further directed to appoint or d
among the agency's personnel, compli
shall be the duty of such officers to s
with the objectives of this Order by c
ciliation, mediation, or persuasion.

Sec. 206. (a) The Secretary of Lab
gate the employment practices of an
contractor or subcontractor, or initiate

tion by the appropriate contrac
mine whether or not the contra
fied in Section 202 of this Ord
Such investigation shall be co
with the procedures establishe
Labor and the investigating age
Secretary of Labor any action t

(b) The Secretary of Labor
tigate or cause to be invest
employees or prospective emplc
contractor or subcontractor wl
tion contrary to the contractual
Section 202 of this Order. If th
ducted for the Secretary of L
agency, that agency shall report
action has been taken or is reco
to such complaints.

Sec. 207. The Secretary of
efforts, directly and through
other interested Federal, State,
tractors, and all other availab
cause any labor union engaged
ment contracts or any agency re
viding or supervising apprentic
in the course of such work to
mentation of the purposes of
tary of Labor shall, in appro
Equal Employment Opportu
Department of Justice, or oth

agencies whenever it has reasc
practices of any such labor orga
late Title VI or Title VII of the C
or other provision of Federal la

Sec. 208. (a) The Secreta
agency, officer, or employee in t
the Government designated b
order of the Secretary, may hol
or private, as the Secretary m
compliance, enforcement, or ed

(b) The Secretary of Labor m
held, hearings in accordance wit
Section prior to imposing, order
the imposition of penalties and
Order. No order for debarment
further Government contracts u
shall be made without affordi
opportunity for a hearing.

SUBPART D — SANCTIONS

Sec. 209. (a) In accordance
lations, or orders as the Secretar
adopt, the Secretary or the a
agency may:

(1) Publish, or cause to be p
contractors or unions which it h

plied or have failed to
this Order or of the ru
the Secretary of Labor.

(2) Recommend to t
in cases in which there
tion or the threat of sub
the contractual provisi
this Order, appropriate
force those provisions,
the limitations of appli
dividuals, or groups wh
or seek to prevent dir
with the provisions of

(3) Recommend to t
tunity Commission or
appropriate proceedings
the Civil Rights Act of

(4) Recommend to
criminal proceedings b
false information to an
Secretary of Labor as t

(5) Cancel, termina
celled, terminated or s
portion or portions the
tor or subcontractor t
nation provisions of t
cancelled, terminated,

tinuance of contracts m
gram for future compli
ing agency.

(6) Provide that an
frain from entering int
sions or other modificat
any noncomplying con
has satisfied the Secret
tor has established and
employment policies i
sions of this Order.

(b) Under rules and
Secretary of Labor, each
reasonable efforts with
to secure compliance w
this Order by method
mediation, and persuasi
instituted under Subsec
fore a contract shall be c
or in part under Subse
failure of a contractor o
the contract provisions

Sec. 210. Any contr
authorized by this S
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under the rules and reg
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under this Se
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The agency s
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Sec. 211.
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Sec. 212.
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SUBPART E

Sec. 213.
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Sec. 214.
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has failed to

Sec. 215.
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of Merit whi

PART I
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Sec. 301.
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assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

Sec. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of non-discrimination in employment, other than requirements imposed pursuant to this Order,

may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV — Miscellaneous

Sec. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

Sec. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

Sec. 403. (a) Executive Orders Nos. 10590 (January 18, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by

Executive Order No. 10925 is hereby abolished. A
ords and property in the custody of the Com
shall be transferred to the Civil Service Comm
and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed
lieve any person of any obligation assumed or in
under or pursuant to any Executive Order supe
by this Order. All rules, regulations, orders, i
tions, designations, and other directives issued
President's Committee on Equal Employment O
tunity and those issued by the heads of various d
ments or agencies under or pursuant to any
Executive orders superseded by this Order, shall
extent that they are not inconsistent with this
remain in full force and effect unless and until r
or superseded by appropriate authority. Refere
such directives to provisions of the superseded
shall be deemed to be references to the comparab
visions of this Order.

Sec. 404. The General Services Adminis
shall take appropriate action to revise the st
Government contract forms to accord with the
sions of this Order and of the rules and regulat
the Secretary of Labor.

Sec. 405. This Order shall become effective
after the date of this Order.

41 C.F.R. 60-1.3

"Administering agency" means any depar
agency and establishment in the Executive Br
the Government, including any wholly owned C
ment corporation, which administers a progr
volving federally assisted construction contrac

"Administrative Law Judge" means an Admi
tive Law Judge appointed as provided in 5 U.S.
and Subpart B of Part 930 of Title 5 of the Code
eral Regulations (see 37 FR 16787) and qualified
side at hearings under 5 U.S.C. 557.

"Agency" means any contracting or any admi
ing agency of the Government.

"Applicant" means an applicant for Federa
tance involving a construction contract, or othe
cipant in a program involving a construction c
as determined by regulation of an admini
agency. The term also includes such persons aft
become recipients of such Federal assistance.

"Compliance Agency" means the agency des
by the Director on a geographical, industry c
basis to conduct compliance reviews and to un
such other responsibilities in connection with
ministration of the Order as the Director ma
mine to be appropriate.

"Construction work" means the c
habilitation, alteration, conversion, e
lition or repair of buildings, highways,
or improvements to real property, in
providing utility services. The term a
supervision, inspection, and other c
incidental to the actual construction.

"Contract" means any Government
federally assisted construction contra

"Contracting agency" means a
agency, establishment, or instrumenta
utive Branch of the Government, inclu
owned Government corporation, wh
contracts.

"Contractor" means, unless otherw
prime contractor or subcontractor.

"Director" means the Director, O
Contract Compliance Programs
Department of Labor or any person t
gates authority under the regulations

"Equal opportunity clause" means t
visions set forth in §60-1.4(a) or (b),

"Federally assisted construction cont
agreement or modification thereof be
cant and a person for construction wo

for in whole or in part with funds obt
Government or borrowed on the credit
ment pursuant to any Federal progr
grant, contract, loan, insurance, or
undertaken pursuant to any Federal p
ing such grant, contract, loan, insura
tee, or any application or modificati
proved by the Government for a grant
insurance, or guarantee under which t
self participated in the construction w

"Government" means the Governm
ed States of America.

"Government contract" means any
modification thereof between any con
and any person for the furnishing of s
ices or for the use of real or personal p
ing lease arrangements. The term "serv
this section includes but is not limited
services: Utility, construction, tran
search, insurance, and fund deposit
"Government contract" does not inc
ments in which the parties stand in th
employer and employee, and (2) federa
struction contracts.

"Minority group" as used herein sha
appropriate, female employees and pe
employees.

"Modification" means any al
conditions of a contract, inclu
ments, amendments, and ext

"Order", "Executive Orde
11246" means Parts II, III, an
11246 dated September 24, 1
Executive order amending su
Executive order superseding

"Person" means any natu
partnership, unincorporated a
government, and any agency,
division of such a governmen

"Prime contractor" means a
tract and, for the purposes o
any person who has held a
Order.

"Recruiting and training ag
who refers workers to any c
tor or who provides for emplc
or subcontractor.

"Rules, regulations, and re
retary of Labor" used in pa
opportunity clause means rul
vant orders of the Secretary
issued pursuant to the Orde

"Secretary" means the Secret
Department of Labor.

"Site of construction" means th
cation of any building, highway, o
provement to real property whic
struction, rehabilitation, alterati
tension, demolition, or repair and
tion or facility at which a contract
other participating party meets a d
function relating to the contract

"Subcontract" means any agr
ment between a contractor and a
the parties do not stand in the
employer and an employee):

(1) For the furnishing of supp
the use of real or personal prop
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to the performance of any one o

(2) Under which any portion
obligation under any one or m
formed, undertaken, or assumed

"Subcontractor" means any p
contract and, for the purposes of
any person who has held a subc
Order. The term "First-tier subc

subcontractor holding
tractor.

"United States" as u
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wealth of Puerto Rico,
possessions of the Un
effective February 17,

41 C

(a) *Government contra*
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(and modifications the
inal contract):

During the perform
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(1) The contractor
employee or applicant
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are employed, and tha
employment, without
gion, sex, or national
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cruitment advertising; la
pay or other forms of co
training, including app
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employees and applicant
be provided by the contra
provisions of this nondis

(2) The contractor wi
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contractor, state that all
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race, color, religion, sex,

(3) The contractor wi
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representative of the con
section 202 of Executive
1965, and shall post copie
places available to em
employment.

(4) The contractor w
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of the rules, regulation
Secretary of Labor.

(5) The co
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(7) The co
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(b) *Federally*
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contract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for non-compliance: *Provided, however,* That in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided,* That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of

the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(Subsection 60-1.4(b)(2) on federally assist
struction contracts was rescinded by public
the Federal Register, effective March 28, 197

(c) *Subcontracts.* Each nonexempt prime
tor or subcontractor shall include the equal
tunity clause in each of its nonexempt subcor

(d) *Incorporation by reference.*— The equal opp
clause may be incorporated by reference in all
ment contracts and subcontracts, including
ment bills of lading, transportation requests, c
for deposit of Government funds, and contr
issuing and paying U.S. savings bonds and no
such other contracts and subcontracts as the
may designate.

(e) *Incorporation by operation of the Order.*— B
tion of the Order, the equal opportunity clause
considered to be a part of every contract and
tract required by the Order and the regulation
part to include such a clause whether or not it i
ally incorporated in such contracts and whethe
the contract between the agency and the cont
written. (Subsections (d) and (e), as revised,
February 17, 1977)

(f) *Adaptation of language.* Such necessary
in language may be made in the equal opp
clause as shall be appropriate to identify pro

parties and their undertakings. (As last amer
March 28, 1975)

41 C.F.R. 60-1.43

Each prime contractor and subcontractor shall
mit access during normal business hours to its pr
ises for the purpose of conducting on-site compli
reviews and inspecting and copying such books,
ords, accounts, and other material as may be relev
the matter under investigation and pertinent to c
pliance with the order and the rules and regulat
pursuant thereto by the agency, or the Director. In
mation obtained in this manner shall be used onl
connection with the administration of the Order,
administration of the Civil Rights Act of 1964
amended) and in furtherance of the purposes of
Order and that Act. (See 41 CFR Part 60-60, Con
tor Evaluation Procedures For Nonconstruction C
tractors; 41 CFR Part 60-40. Examination and C
ing of OFCCP Documents.)

40 U.S.C. §471

40 U.S.C. §471. Congressional declaration of p

It is the intent of the Congress in enacting this l
lation to provide for the Government an econo
and efficient system for (a) the procurement and
ply of personal property and nonpersonal service
cluding related functions such as contracting, in

tion, storage, issue, specifications, proper
tion and classification, transportation
management, establishment of pools or
transportation of Government personnel
ty by motor vehicle within specific areas,
of public utility services, repairing and
establishment of inventory levels, estab
forms and procedures, and representation
eral and State regulatory bodies; (b) the
available property; (c) the disposal of surp
and (d) records management.

41 U.S.C. §§251-260

41 U.S.C. §251. Declaration of pur
chapter

The purpose of this chapter is to facili
curement of property and services.

41 U.S.C. §252. Purchases and contra
erty—Applicability of chapter; delegation

(a) Executive agencies shall make p
contracts for property and services in acc
the provisions of this chapter and implem
lations of the Administrator; but this cha
apply—

(1) to the Department of Def
Coast Guard, and the National Ae
and Space Administration; or

(2) when this chapter is made ir
pursuant to section 474 of Title
other law, but when this chapter i
applicable by any such provision c
tions 5 and 8 of this title shall be ap
the absence of authority conferred
to procure without advertising or w
gard to said section 5.

Small business concerns; share of
advance publicity on negoti
purchases and contracts for pr

(b) It is the declared policy of the C
fair proportion of the total purchases an
property and services for the Govern
placed with small business concerns. I
proposed to make a contract or purcha
$10,000 by negotiation and without ad
suant to the authority of paragraph (7)
section (c) of this section, suitable advan
determined by the agency head with du
type of property involved and other
siderations, shall be given for a period
teen days, whenever practicable, as det
agency head.

Negotiated purchases and co
for property; condition

(c) All purchases and contracts for
services shall be made by advertising,

section 253 of this title, except
contracts may be negotiated by
out advertising if—

(1) determined to be
public interest during the
emergency declared by the
Congress;

(2) the public exigenc
the delay incident to adve

(3) the aggregate am
not exceed $10,000;

(4) for personal or pr

(5) for any service to
university, college, or othe
tution;

(6) the property or se
cured and used outside the
ed States and its possessic

(7) for medicines or

(8) for property pur
ized resale;

(9) for perishable or
sistence supplies;

(10) for property or se
impracticable to secure c

(11) the agency head dete
purchase or contract is for e
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(12) for property or servi
the agency head determines t
ter, ingredients, or compone
such that the purchase or con
be publicly disclosed;

(13) for equipment which
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order to assure standardizatic
and interchangeability of par
standardization and interc
necessary in the public intere

(14) for property or servi
the agency head determines
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(either as to all or as to som
quirements) or have not bee
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no negotiated purchase or
entered into under this parag
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less (A) notification of the in

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(15) otherwise
that section 254 of
chases and contrac
ing under this para

Bids in violat

(d) If in the opinio
ceived after advertising
antitrust laws he shall
General for appropriat

Except

(e) This section sh
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heretofore, or (B) per
struction or repair o
sewers, mains, or simil
out advertising as requ
unless such contract i
continental United Sta
contract is authorized
(1)-(3), (10)-(12), or (14

Carriage of cargo; spe

(f) No contract for
property in other than G
tainers shall require carr
containers of any stated

41 U.S.C. §253. Adve

Whenever advertising

(a) The advertisemen
ficient time previous to
specifications and invitat
full and free competition
curement of types of pr
to meet the requirement
advertisement or invitat
Government property
owned cargo containers
property in cargo cont
height, or width.

(b) All bids shall be p
place stated in the adver
with reasonable prompt
responsible bidder who
tation for bids, will b
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vided, That all bids may
head determines that it

41 U.S.
Requirement

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(1) make advance, partial, progress or other payments under contracts for property or services made by the agency; and

(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Payments made under subsection (a) of this section may not exceed the unpaid contract price.

(c) Advance payments under subsection (a) of this section may be made only upon adequate security and a determination by the agency head that to do so would be in the public interest. Such security may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens.

41 U.S.C. §256. Repealed. Sept. 10, 1950, c. 849, §10(b), 64 Stat. 591, eff. July 1, 1949

41 U.S.C. §256a. Waiver of liquidated damages

Whenever any contract made on behalf of the Government by the head of any Federal Agency, or by officers authorized by him so to do, includes a provision for liquidated damages for delay, the Comptroller

General upon recommendation of such head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable.

41 U.S.C. §257. Administrative determinations—Conclusiveness; delegation of powers

(a) The determinations and decisions provided in this chapter to be made by the Administrator or other agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, and except as provided in section 486(d) of Title 40 with respect to the Administrator, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

Nondelegable powers; powers delegable to certain persons

(b) The power of the agency head to make the determinations or decisions specified in paragraphs (12) and (13) of section 252(c) of this title shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 252(c) of this title shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000.

Basis of determinations; findings conclu
preservation of findings; copy

(c) Each determination or decision req
paragraphs (11)-(13), or (14) of section 252(c
tion 254 or by section 255(c) of this title shall
upon written findings made by the official ma
determination, which findings shall be final an
available within the agency for a period of at
years following the date of the determinatio
of the findings shall be submitted to the
Accounting Office with the contract.

Preservation of data

(d) In any case where any purchase or co
negotiated pursuant to the provisions of secti
of this title, except in a case covered by paragr
(5), or (6) of section 252(c) of this title, the dat
spect to the negotiation shall be preserved in t
the agency for a period of six years following
ment on such contract.

41 U.S.C. §258. Laws applicable to contr

No purchase or contract shall be exempt f
tions 35-45 of this title, or from sections 276a
5 of Title 40, solely by reason of having bee
into pursuant to section 252(c) of this title
advertising, and the provisions of sections
276a—5, 324 and 325a of Title 40, if otherw
cable, shall apply to such purchases and con

41 U.S.C. §259. Definitions

As used in this chapter—

(a) The term "agency head" shall mean the he any assistant head of any executive agency, and n the option of the Administrator include the chie cial of any principal organizational unit of the Ge Services Administration.

(b) Repealed.

41 U.S.C. §260. Laws not applicable to contr

Sections 5, 8 and 13 of this title shall not apply procurement of property or services made by an utive agency pursuant to this chapter. Any provisi law which authorizes an executive agency (other an executive agency which is exempted from the visions of this chapter by section 252(a) of this tit procure any property or services without adver or without regard to said section 5 shall be constru authorize the procurement of such property or ices pursuant to section 252(c)(15) of this title wi regard to the advertising requirements of sec 252(c) and 253 of this title.

L. 89-343, §5, 79 Stat. 1303.

APPENDIX D

OPINION AND ORDER
OF THE DISTRICT COUR

United States District Cou
Eastern District of Louisian

UNITED STATES OF AMERI

versus CA
S

NEW ORLEANS PUBLIC SERVIC
D

This action was initiated by the
Department of Justice to enforce certa
obligations imposed by Executive Or
amended, 30 F.R. 12319 (hereinafter Ex
11246), and the Rules and Regulations
ant thereto, 41 C.F.R. 60-1 et seq. and to
their violation. The complaint alleged th
ant, the New Orleans Public Service, In
NOPSI) is a contractor within the meani
60, and at all material times has been su
tive Order 11246, and all implementi
issued thereunder. The complaint als
NOPSI had violated Executive Order 1
and refusing to comply with its provisi

NOPSI, in its answer, admitted that
refused to comply with the provisio
Order 11246 and the Rules and Regulat
suant thereto, but asserted that it wa
Executive Order 11246 because "sinc
tract, either written or oral, [had] exi
and the United States or any of its ag

The Court, pursuant to Fed.R.Civ.P
the issue of whether NOPSI was a G
tractor subject to Executive Order
Rules and Regulations issued pursuan
all other issues in the case.

A two day trial was held on the is
NOPSI was a Government contractor
utive Order 11246, and the Rules a
issued pursuant thereto. At the close
dence the Court held that NOPSI was
contractor, subject to Executive Ord
Court took under submission the Un
quest for an injunction restraining N
ing or refusing to comply with Executi
and requiring NOPSI to undertake w
Services Administration a compliar
NOPSI's property.

The Court, after due consideration
adduced at trial, briefs submitted by c
law, makes the following findings of f
sions of law:

FINDINGS OF

1.

NOPSI is incorporated under
Louisiana and is engaged as a p
ness of production, distributio
power to consumers on the East
River in the City of New Orlea
sale and distribution of natural
City of New Orleans, Louisian

2.

NOPSI is regulated by the Cit
New Orleans. The City Counc
indeterminate permit (or franc
consumers in the City of New
on the East Bank of the Missi
issued NOPSI an indeterminat
gas to consumers throughout t

3.

The difference between an in
a franchise is that under a franc
ed the right to supply utility ser
fixed period of time, while und
mit a company is granted the r
ices indefinitely but with a ri
City Council) to buy the uti
Company and thus termin
permit.

4.

NOPSI received its electri
determinate permits from the
of New Orleans in 1922.

5.

NOPSI is the sole company
minate permit from the City
New Orleans for the supply
ices to consumers in the City
located on the East Bank of t

6.

A consumer located on the
sissippi River in the City of N
to obtain electrical utility ser
service from NOPSI.

7.

All federal agencies, includ
nautics and Space Administrat
Facility (hereinafter NASA's
receive electrical utility servi
cated on the East Bank of the
City of New Orleans. These
alternative source of electrica

8.

NOPSI is the sole compan
minate permit from the City

New Orleans for the
ices to consumers in

NOPSI provides m
ices for consumers loc
including federal age
companies in New C
other sources, NOPS
necting natural gas t
pany to the Parish of
specifically agreed to

The parent compar
South Utilities, Inc. w

NOPSI is guarante
and natural gas utility
of New Orleans by
nance 7068.

NOPSI earned a pr
investment in 1973, a
on its natural gas an
consumers in the Cit

The City Council of t
granted NOPSI rate in
sumers for electrical a

Facilities which are o
on federal property in
clude:

a. All of one unm
and part of anothe
ter Substations), lo
Assembly Facility I
Substation was bu
the Michoud prope
Substation was bui
property.

1. Each substa
into two parts, c
trical equipment
by defendant N
taining electrica
maintained by N

2. NOPSI curr
into the substat

3. In addition
ing circuit brea
NOPSI also ow
lators and switc

b. Electr
in federal

1. *Fede*
Str

2. *Uni*
Str

3. *Uni*
Str

4. *Uni*
and

5. *Uni*
the

6. *Uni*

In the City c
electrical and/
NOPSI from 1
value of utilit

a. *NASA'S*

1. Electric
$845,527.12;
374.99; (e) 19
(g) 1971: $63
$896,267.64.

2. Natura
$302,213.67;

697.39; (e) 19(
(g) 1971: $341
$505,191.92.

3. Total dc
received from

b. *United St*
Ave.:

1. Electricit
$191,737.29; (
528.64; (e) 19(
(g) 1971: $209,
$299,307.70.

2. Natural
$41,916.46; (c)
(e) 1969: $38,(
$42,209.10; (h

3. Total dc
received from

c. *United St*

1. Electrici
329.57; (c) 19(
(e) 1969: $99,
$110,609.19;
927.07.

2. Natural
$19,828.81; (c

(e) 19
$20,8

3.
recei

d.
Resear

1.
771.3
1969:
193.3

2.
$11,7
(e) 19
$15,9

3.
receiv

e.
Naval

1.
643.6
1969:
911.7

2.
459.9
1969:
878.4

3. T
receive

f. U

1. E
187.01;
1969: $
997.25;

2. N
$14,19
(e) 196
$14,46

3. T
receive

g. U
ministra

1. E
101.86;
1969: $
947.59,

2. I
232.53
1969:
084.90

3.
receiv

h.

1.
(c) 19

$29,481.47; (f) 1970: $29,663.20; (g) 1971: $30,495.47; (h) 1972: $32,437.30; (i) 1973: $45,642.59.

2. Natural Gas: (a) 1965: none; (b) 1966: $4,785.86; (c) 1967: $7,038.86; (d) 1968: $7,237.08; (e) 1969: $7,-329.72; (f) 1970: $6,737.03; (g) 1971: $8,158.78; (h) 1972: $10,655.87; (i) 1973: $19,474.83.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: $65,117.42.

i. *United States Engineers, Prytania or Millaudon and the River:*

1. Electricity: (a) 1965: $25,836.49; (b) 1966: $32,-663.05; (c) 1967: $37,531.29; (d) 1968: $38,552.85; (e) 1969: $41,435.78; (f) 1970: $42,794.62; (g) 1971: $44,-768.12; (h) 1972: $46,280.24; (i) 1973: $60,957.42.

2. Natural Gas: (a) 1965: $1,820.23; (b) 1966: $2,-160.09; (c) 1967: $1,766.61; (d) 1968: $2,142.37; (e) 1969: $1,961.34; (f) 1970: $1,986.07; (g) 1971: $1,-931.81; (h) 1972: $2,371.15; (i) 1973: $3,648.33.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: $64,605.75.

j. *C.O. Naval Support Activity:*

1. Electricity: None is received from defendant NOPSI. The facility is located on the West Bank of the Mississippi River in the City of New Orleans.

2. Natural Gas: (a) 1965: $35,170.08; (b) 1966: $35,803.62; (c) 1967: $32,947.95; (d) 1968: $38,970.64;

(e) 1969: $39,181.67; (f) 1970: $38,473.86; (g) 1971: $37,056.48; (h) 1972: $39,238.26; (i) 1973: $54,765.61.

3. Total dollar value of natural gas received from NOPSI in 1973: $54,765.61.

k. *United States Court of Appeals, 600 Camp Street [General Services Administration]:*

1. Electricity: Service begun in 1972. (a) 1972: $11,-161.56; (b) 1973: $41,332.60.

2. Natural Gas: None was received in 1973.

3. Total dollar value of electricity received from NOPSI in 1973: $41,332.60.

1. *United States Coast Guard Pontchartrain Barracks, Urquhart and Industrial Canal:*

1. Electricity: (a) 1965: $3,333.91; (b) 1966: $6,-792.33; (c) 1967: $6,794.28; (d) 1968: $6,809.86; (e) 1969: $18,157.85; (f) 1970: $21,271.19; (g) 1971: $19,-750.58; (h) 1972: $19,567.36; (i) 1973: $28,198.33.

2. Natural Gas: (a) 1965: $1,697.96; (b) 1966: $1,-542.62; (c) 1967: $1,563.55; (d) 1968: $1,807.25; (e) 1969: $2,155.86; (f) 1970: $3,623.24; (g) 1971: $2,-852.15; (h) 1972: $3,270.83; (i) 1973: $3,943.47.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: $32,141.80.

m. *Raymond Fleming Training Center (formerly C roy Johnson) [Director of Facilities Engineering]:*

1. Electricity: (a) 1965: none; (b) 1966: $13,3 (c) 1967: $14,326.49; (d) 1968: $18,999.80; (e) $11,447.95; (f) 1970: $11,285.68; (g) 1971: $11,5 (h) 1972: $12,214.13; (i) 1973: $16,524.89.

2. Natural Gas: (a) 1965: $2,900.83; (b) 196 820.21; (c) 1967: $2,226.67; (d) 1968: $2,936. 1969: $2,876.83; (f) 1970: $2,893.53; (g) 197 839.90; (h) 1972: $1,844.22; (i) 1973: $2,958.51

3. Total dollar value of electricity and natu received from NOPSI in 1973: $19,483.40.

n. *United States Coast Guard, North Depot N. Robert Industrial Canal:*

1. Electricity: (a) 1965: $3,353.73; (b) 196 697.81; (c) 1967: $8,495.83; (d) 1968: $9,295. 1969: $9,253.91; (f) 1970: $11,314.36; (g) 1971 812.48; (h) 1972: $14,642.35; (i) 1973: $19,415.

2. Natural Gas: None is received.

3. Total dollar value of electricity receive NOPSI in 1973: $19,415.41.

o. *NASA's Michoud Wet Storage Area:*

1. Electricity: (a) 1965: $1,993.46; (b) 196 077.74; (c) 1967: $5,495.04; (d) 1968: $6,566. 1969: $6,694.79; (f) 1970: $7,000.94; (g) 197 555.63; (h) 1972: $7,846.02; (i) 1973: $9,993.0

2. Natural Gas: None is received.

3. Total dollar value of electricity receiv NOPSI in 1973: $9,993.00.

p. *United States Attorney's Office, 500 St. Lo [General Services Administration]*:

1. Electricity: (a) 1965: none; (b) 1966: n 1967: $3,741.38; (d) 1968: $5,132.63; (e) 19 146.77; (f) 1970: $5,233.81; (g) 1971: $5,598 1972: $5,622.88; (i) 1973: $7,179.84.

2. Natural Gas: (a) 1965: $3,449.55; (b) 19 038.21; (c) 1967: $3,058.49; (d) 1968: $3,67 1969: $1,991.77; (f) 1970: $1,694.29; (g) 19 774.30; (h) 1972: $1,621.36; (i) 1973: $2,255.2

3. Total dollar value of electricity and nat received from NOPSI in 1973: $9,435.13.

q. *United States Army Engineer Corps.* Urquhart dustrial Canal:

1. Electricity: (a) 1965: $7,454.27; (b) 19 972.33; (c) 1967: $6,798.91; (d) 1968: $6,65 1969: $6,566.04; (f) 1970: $6,743.02; (g) 19 664.31; (h) 1972: $6,860.37; (i) 1973: $8,814.0

2. Natural Gas: None is received.

3. Total dollar value of electricity receiv NOPSI in 1973: $8,814.02.

16.

In 1973, the NOPSI supplied the federa
ed in paragraph 15 with electrical utility s
total value was $1,924,757.32.

17.

In 1973, the NOPSI supplied the federa
ed in paragraph 15 with gas utility servi
value was $758,616.42.

18.

In 1973, the NOPSI supplied the federa
ed in paragraph 15 with electrical and na
ty services whose total value was $2,68

19.

In addition to the federal agencies l
graph 15, NOPSI also supplies other fed
cations with electric and/or natural gas u
These locations include the:

a. *United States Coast Guard Housing De*
NOPSI supplies with electrical utility s

b. *United States Navy Housing Project*
supplies with natural gas utility service

c. *General Services Administration Motor*
Liberty Streets which NOPSI supplies with
ity services.

d. *General Services Administration Parkin Street* which NOPSI supplies with el services.

e. *Federal Office Building, Chef Menteur* NOPSI supplies with electrical and nat services.

f. *United States Quarantine Property.*

g. *Federal Office Building, 600 South Street* supplies with electrical and natural gas u

h. *United States Post Office Garage, 764* which NOPSI supplies with electrical a utility services.

i. *Federal Aviation Facility, New Orlean port,* which NOPSI supplies with el services.

j. The following branch offices of the Post Office are supplied by NOPSI with natural gas utility services:

(1) *United States Post Office Branch, 43 ville Street.*

(2) *United States Post Office Branch, 3 delet Street.*

(3) *United States Post Office Branch, Street.*

(4) *United States Post Office Branch, Menteur Highway.*

(5) *United States Post Office L*
Avenue.

(6) *United States Post Office L*
ington Avenue.

(7) *United States Post Office,*

20.

Currently, and from 1965 thr
following federal agencies has a
than $10,000 in total electrical a
ty services from NOPSI:

a. NASA's Michoud Facili

b. United States Post Offi
701 Loyola Avenue;

c. United States Veteran
Hospital;

d. United States Departi
ture, Southern Researc

e. United States Navy Po
[Gulf Division, Nava
neering];

f. United States Public S

g. United States Custom
Services Administratio

h. United States Engin
Millaudon and the Riv

i. C. O. Naval Support A

21.

NOPSI currently supplies th
federal agencies with electrical a
ity services whose total value exc

a. Federal Reserve Bank,
Avenue;

b. United States Court
Camp Street [General S
tration];

c. United States Coast
train Barracks, Urquha
Canal;

d. Raymond Fleming Trai
merly Camp Leroy Johr
Facilities Engineering];

e. United States Coast Gu
N. Robertson and Indu

22.

Currently, and from 1965 thr
following federal agencies has a
than $50,000 in total electrical a
ty services from defendant NO

a. NASA's Michoud Facil

b. United States
701 Loyola Av

c. United States
Hospital;

d. United States
ture, Southern

e. United States
[Gulf Division
ing];

f. United States
and

g. United States
Services Admi

NOPSI currently su
federal agencies with e
ity services whose total

a. Federal Reser
Ave.;

b. United State
Millaudon and

c. C. O. Naval S

NOPSI, since 1965,
employees.

All of the federal age
electrical and/or natural
NOPSI on a monthly b
bills for utility services
of utility services prov
agency and the specific
paid.

All of the federal a
and/or natural gas utilit
such services on a regu

Should a customer f
natural gas utility serv
available recourse of tak
court in order to collect
ices provided by NOPS

Every federal agenc
and/or natural gas util
ceiving such services
from NOPSI.

NOPSI currently su

gas utility ser
ten agreemer

a. *United*
NOPSI curre
tion Hospita
services purs
was executed
the contract
which was re
Presidential E
(6 F.R. 6787,
15301). The
1973, when
plied electrica
had been app
New Orleans
and were acc
Administratio

b. *United S*
ly supplies th
with electrici
written contr
1936. The co
1973, when
plied electrica

1 The amount
NOPSI for ele
$155,927.07 in
increased from

had been app
New Orleans
and were ac
Health Servic

c. *United*
Urquhart and I
the United S
racks) with e
formal writte
20, 1951. The
clause require
(6 F.R. 3109),
9664 (10 F.R.
cations of the

1. A Dece
tween NOPSI
utility service
Avenue and

2. A 1973
NOPSI to the
for electric a
been approve
Orleans, and
the Coast Gu

d. *Raymon*
Johnson): NOI
ing Training

(5) That paragraphs 15 and 17 of the contract form, refer to the form as a "contract";

(6) That the contract form is signed by both the customer and a representative of defendant NOPSI; and

(7) That residential customers of NOPSI are not required to sign the contract form.

NOPSI's contract with the Department of Agriculture was most recently modified in 1973, when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contract and accepted through payment by the Department of Agriculture.

g. *United States Post Office Branch, 4317 Bienville Street:* NOPSI currently supplies electrical and natural gas utility services pursuant to a written contract entitled "Customer's Application and Contract with New Orleans Public Service, Inc.", which was signed by a NOPSI representative and a Post Office representative prior to 1964. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contract and were accepted through payment by the Post Office.

h. *United States Post Office Branch, 3923 Carondolet Street:* NOPSI currently supplies electrical and natural gas utility services pursuant to a written contract entitled "Customer's Application and Contract with New Orleans Public Service, Inc.," which was signed by a NOPSI representative and a Post Office representative prior to 1964. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the Contract and were accepted through payment by the Post Office.

i. *United States Post Office Branch, 2051 Caton Street:* Defendant NOPSI currently supplies electrical and natural gas utility service pursuant to a written contract entitled "Customer's Application and Contract with New Orleans Public Service, Inc.", which was signed by a NOPSI representative and a Post Office representative prior to 1964. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans were applied by NOPSI to the contract and accepted through payment by the Post Office.

j. *United States Post Office Branch, 13225 Chef Menteur Highway:* Defendant NOPSI currently supplies electrical and natural gas utility services pursuant to a

written contract entitled "Customer's Applicati
Contract with New Orleans Public Service,
which was signed by a NOPSI representative an
Office representative. The contract was most r
modified in 1973 when revised rate schedu
NOPSI-supplied electrical and natural gas utilit
ices, which had been approved by the City Co
the City of New Orleans, were applied by NOPS
contract, and were accepted through payment
Post Office.

k. *United States Post Office Branch, 1111 Poland*
NOPSI currently supplies electrical and natu
utility services pursuant to a written contract e
"Customer's Application and Contract with
Orleans Public Service, Inc.," which was signe
NOPSI representative and a Post Office repr
tive. The contract was most recently modified i
when revised rate schedules for NOPSI-supplie
trical and natural gas utility service, which had b
proved by the City Council of the City of New O
were applied by NOPSI to the contract an
accepted through payment by the Post Office.

l. *United States Post Office Branch, 4730 Wa*
Avenue: NOPSI currently supplies electrical an
ral gas utility services pursuant to a written c
entitled "Customer's Application and Contra
New Orleans Public Service, Inc.", which was si
a NOPSI representative and a Post Office repr

tive. The contract was most recently modified in
when revised rate schedules for NOPSI-supplied
trical and natural gas utility services, which had
approved by the City Council of the City of
Orleans were applied by NOPSI to the contrac
were accepted through payment by the Post Of

m. *Federal Office Building, 600 South Street:* NOPS
rently supplies electrical and natural gas utility
ices pursuant to two, separate, one-page written
tracts entitled "Request for Metered Service" v
were each signed by a NOPSI representative and a
representative in 1961. The 1961 contracts rep
longer written contracts between GSA and N
which had been signed on July 1, 1950. NOPSI a
the following with regard to the one page GSA
quest for Metered Service" form:

1. That NOPSI representatives often refer t
form as a "short form contract".

2. That the short form contract originates as
quest for Metered Service which GSA sends to N
Upon receipt of the request, a NOPSI represen
then signs the document on NOPSI's behalf in a
provided for that purpose on the contract form

NOPSI's 1961 electrical and natural gas cor
with GSA were most recently modified in 1973
revised rate schedules for NOPSI-supplied ele
and natural gas utility services, which had be

proved by the City Council of the City
were applied by NOPSI to the con
accepted through payment by GSA.

In 1973, GSA sent NOPSI a new p
contract to replace the 1961 written
The new proposed written contract co
opportunity clause required by Executi
In a letter dated April 2, 1973, NOPSI
proposed contract on the grounds, *in*
equal opportunity clause in the contra
factory" to NOPSI.

n. *United States Court of Appeals, 600 (*
SI currently supplies electrical and na
services to the Court of Appeals Build
two, separate, one-page written contra
quest for Metered Service", which w
NOPSI representative and a GSA r
1972.

The 1972 Contracts were most rec
1973 when revised rate schedules for
electrical and natural gas utility ser
been approved by the City Council of
Orleans, were applied by NOPSI to t
were accepted through payment by (

o. *GSA Motor Pool, Girod and Liberty*
currently supplying electrical and pro
utility service pursuant to a one page

entitled "Request for Metered Servic
signed by a NOPSI representative and
sentative in 1972, and which replaced a
contract when the Motor Pool was relo
The contract was most recently modifie
revised rate schedules for NOPSI-sup
and natural gas utility services, which
proved by the City Council of the City of
were applied by NOPSI to the contr
accepted through payment by GSA.

p. *GSA Parking Lot, St. Charles Street:* N
ly supplies electrical utility service pur
page written contract entitled "Reques
Service", which was signed by a NOPSI
and a GSA representative. The contrac
cently modified in 1973 when revised rat
NOPSI-supplied electrical and natural g
ices, which had been approved by the C
the City of New Orleans, were applied b
contract and accepted through paymen

q. *Federal Office Building, Chef Me*
NOPSI currently supplies electrical a
utility services pursuant to a one pag
tract entitled "Request for Metered S
was signed by a NOPSI representative
resentative. The contract was most rec
in 1973 when revised rate schedules f
plied electrical and natural gas utility

had been approved by the Cit
New Orleans, were applied by
and were accepted through pa

r. *United States Quarantine P*
the Quarantine property cu
services from defendant NOPS
written contract entitled "Rec
ice", which was signed by a NO
GSA representative. The con
modified in 1973 when revi
NOPSI-supplied electrical and
ices, which had been approve
the City of New Orleans, were
contract and were accepted th

s. *United States Attorney's O*
NOPSI currently supplies el
utility service pursuant to a o
entitled "Request for Meter
signed by a NOPSI represent
sentative. The contract was m
1973 when revised rate sched
electrical and natural gas uti
been approved by the City C
Orleans, were applied by NC
were accepted through paym

t. *United States Customs Hou*
currently supplies electrical
services pursuant to a one

titled "Request for Metered Ser
ed in August, 1961 by a NOPS
GSA representative. The curr
placed a prior contract at the sa
tract was most recently modifie
rate schedules for NOPSI-suppli
ral gas utility services, which ha
City Council of the City of New
by NOPSI to the contract and v
payment by GSA.

In 1973, GSA sent NOPSI a
contract to replace the 1961 wri
The new proposed written contr
opportunity clause required by E
In a letter dated April 2, 1973, N
proposed contract on the grou
equal opportunity clause in the
factory" to NOPSI.

u. *Federal Aviation Facility, Ne
port:* NOPSI currently supplies
ices pursuant to a one page wr
"Request for Metered Service",
NOPSI representative and a GS
contract was most recently mo
vised rate schedules for NOPSI
natural gas utility services, wh
by the City Council of the City
applied by NOPSI to the contr
through payment by GSA.

v. *United States Navy*
the Port of Embarkati
the United States Ar
transferred to the Ur

NOPSI currently su
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mal written contract
tives of both NOPS
NOPSI currently prov
the Port of Embarka
written contract whic
tives of both NOPSI a
graph 8 of the 1945
crimination" clause w
in the contract by Pre
(6 F.R. 3109), 9001 (6 F
In June 1966, the Arr
tion informing it that
Embarkation were b
States Navy. Subsequ
sentatives signed wr
ferred the contracts t
cent modifications of

1. Two November
tween NOPSI and th
schedules for NOPS
gas utility services, w
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applicable to the cont

2. 1973 modificatic
NOPSI to the contra
charges for electrical a
which had been appro
City of New Orlean
through payment by t

NOPSI currently su
gas utility services to
which are not in the
ments signed by both
eral agencies to whom

a. *NASA's Michoud*

(1) On September 1
ed a formal written util
July 1, 1965) for the pr
and natural gas utility
Facility. This formal w
term of one year, was
NASA through the ex
1966, 1967, 1968 and
tract was terminated by

(2) Paragraph 7
Michoud formal writte
tained an equal opport
utive Order 10925 (the

11246) to be i
tracts. Paragra

(a) The
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(d) The
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(e) The
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Order 109
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(3) Paragra
Michoud form
of Contract", a

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cations, . .

(4) Paragra
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Order

(6) Representatives of NOPSI, NASA, and GSA met in late 1969 and early 1970 to discuss the formulation of a new formal written electrical and natural gas utilities service contract for NASA's Michoud Facility to replace the 1965 NASA-NOPSI Michoud formal written contract which was due to expire by its own terms on June 30, 1970.

NASA representatives informed NOPSI that they had been directed not to enter any new formal written contracts which contained scope limitation language similar to that contained in paragraph 1 of the 1965 NASA-NOPSI Michoud formal written contract. After a series of discussions, an impasse was reached in which NASA would not agree to the scope limitation and NOPSI would not agree to the inclusion of Executive Order 11246's equal opportunity clause in the formal written contract unless NASA would agree to a scope limitation similar to that contained in the 1965 NASA-NOPSI Michoud formal written contract.

(7) The day after the 1965 NASA-NOPSI Michoud formal written contract was terminated by its own terms, NOPSI's Industrial Representative in charge of NOPSI's relations with federal agencies in New Orleans informed NASA officials via letter that because contract negotiations were still continuing between NASA and NOPSI, NOPSI would continue to provide NASA's Michoud Facility with electric and gas services as it had done in the past, subject to rate schedules set out in the letter. NOPSI also informed NASA

officials that it intended to continue supplying utility services to NASA until further notice from NASA.

(8) Paragraph 15(b) of the 1965 NASA-NOPSI Michoud formal written contract concerned the removal of NOPSI-owned equipment from NASA's Michoud property after termination of their contract. However, NOPSI's equipment was not removed from NASA's Michoud Facility property after the termination date of the formal written contract, as required by their contract, because NASA officials expressly requested that NOPSI continue supplying NASA's Michoud Facility with electrical and natural gas utility services.

(9) Since June 30, 1970, NOPSI has continued to provide NASA's Michoud Facility with electricity and natural gas utility services valued in excess of $1,000,000 per year.

(10) The Senior Assistant Contract Compliance Officer of GSA's Region 7, informed NOPSI via letter dated March 5, 1971, that Federal Government records indicated that NOPSI was a Government contractor subject to Executive Orders 11246 and 11375 and the rules and regulations pertaining thereto, and that GSA had been assigned responsibility for determining the extent to which NOPSI was in compliance with Executive Order 11246.

NOPSI replied in a letter dated March 30, 1971, that NOPSI was not subject to Executive Orders 11246 and

11375 because NOPSI had "no currently ef
government contracts in which we have agree
subject to the provisions of Presidential Ex
Orders 11246 and 11375. . .".

(11) On February 24, 1972, NASA and GSA
sentatives met in New Orleans with NOPSI o
for the purpose of discussing NOPSI's new pr
rate structure and for the purpose of negotiatin
mal written Michoud Facility utilities service c
between NASA and GSA with NOPSI.

At the meeting, the GSA representative sta
behalf of the United States that he had autho
negotiate changes in every provision of the pr
formal written utilities contract with the excep
the equal opportunity clause required by Ex
Order 11246. NOPSI's representatives acknow
that NOPSI was subject to the Civil Rights Act o
but reasserted that it was not subject to, nor w
agree to the inclusion of Executive Order 11246'
opportunity clause in the written contract
NASA and GSA would agree to a scope limitatio
contract similar to that included in the 1965
NOPSI Michoud formal written contract. N
representatives further stated that there would
a formal written contract between NASA and
as long as NASA insisted on including the equal
tunity clause in the contract without also incl
scope limitation similar to that included in th
NASA-NOPSI Michoud formal written contr

(12) The court finds that a contract for the s
of electrical and natural gas utility service cur
exists, and has existed, between NASA and defe
NOPSI.

a. *Federal Reserve Bank:* NOPSI currently su
electrical and natural gas utility service pursu
what was apparently an oral request for service
predates 1964. In 1964, when the location of the
was moved from Carondolet Street to St. C
Street, no new agreement was executed be
NOPSI and the Federal Reserve Bank.

The court finds that the oral agreement be
NOPSI and the Federal Reserve Bank formed
tract between the parties.

b. *United States Army Corps of Engineers, Pryta
Millaudon and the River:* NOPSI currently supplie
trical and natural gas utility service pursuant
agreement which dates back to the 1920's. NOP
no record in its files as to whether the agreeme
ever reduced to writing.

The court finds the agreement between NOP
the Corps of Engineers formed a contract.

c. *United States Guard Housing Development:* NOP
rently supplies electrical utility service pursua
1971 letter request that it received from the
Guard's Contracting Officer.

The court finds this agreement betw
the Coast Guard to be a contract.

d. *United States Navy Housing Project:* N
ly supplies natural gas utility services
1963 letter request from the Navy.

The court finds this agreement betw
the Navy is a contract.

e. *United States Post Office (main branch)*
Post Office's main branch is currently
trical and natural gas utility service pur
written contract entitled "Customer's A
Contract with New Orleans Public Ser
the alternative, pursuant to a letter f
master requesting utility services whi
earlier agreement.

The court finds that the agreement f
ices is a contract.

31.

The Director of the Office of Federal
pliance has designated the General Se
tration as the federal agency responsibl
ing whether utility companies in the
Louisiana area, including defendant
compliance with Executive Order 112

32.

By virtue of GSA's March 15, 1971 l
regarding NOPSI's coverage under Ex
11246 and 11375, NOPSI received no
that Executive Order 11246's equal opp
was considered by GSA to a part of
NOPSI contracts with federal ager
written or unwritten.

33.

NOPSI has since 1965, refused to c
provisions of Executive Order 11246, a
regulations issued pursuant thereto w
cable to Government contractors.

34.

NOPSI has never received a written e
the coverage of Executive Order 11246,
Executive Order 10925, as amended, fr
compliance agency.

35.

NOPSI has never received notice of
federal compliance review agency tha
empt from Executive Order 10925,
Executive Order 11246, as amended.

36.

The Director of the Office of Federal
pliance (hereinafter OFCC), in a letter

July 25, 1972, informed NOP
pursuant to the Secretary of
plementing Executive Order
federal contractor subject to
and the implementing rules
pursuant thereto even thoug
formal written agreement bet
for the provision of electrical
services by NOPSI at NASA'
letter cited sections 202(5) a
Order 11246 and 41 CFR 60-1
and 41 CFR 60-1.4(e) of the S
and regulations implementing
grounds for his determination
ment contractor. The Direc
NOPSI to comply with Execu
the alternative, to face sancti
209(a) of Executive Order 11
referral of the matter to the D
appropriate action.

37.

NOPSI on August 21, 197
GSA by letter that it was NO
not supplying electricity and
Michoud Facility pursuant
written or implied, but was in
ty services to NASA pursua
mits or franchises granted to
body, the City Council of Ne

NOPSI to provide services to
them. The letter stated that since
between NASA and NOPSI, E
and its implementing rules an
apply to NOPSI, and that the
grounds for a compliance revie

CONCLUSIONS

1.

This court has juristiction o
U.S.C. §1345.

2.

The United States has standi
tractual rights in this court. *See*
United States, 350 U.S. 148, 151 (1
v. Frazer, 297 F.Supp. 319 (M.D.

3.

In addition, Section 209(a)(2
11246 (30 F.R. 12319), as am
United States Department of
against substantial or material
thereof, on the part of the def
equal employment opportunity
Order 11246, as amended.

Executive Order 11
law. *United States v. Local*
43 (E.D. La. 1968), *aff'*
cert. denied, 397 U.S. 91
Eastern Pennsylvania v. Sec
3, 1971), *cert. denied*, 40
Builders Association v. Og
F.2d 680 (7th Cir. 197
1284 (D.N.J. 1970). *See*
College District, 238 N.
1968), *aff'd.*, 249 N.E.2
1004 (1970); *Farmer v.*
(3rd Cir. 1964); *Farkas*
629 (5th Cir. 1967).

Section 201 of Execu
responsibility for adm
tive Order 11246 wh
tion in Employment b
Subcontractors" in t
Labor (hereinafter th
more, Section 201 em
"adopt such rules and
as he deems necessar
purpose" of Executive

Section 202 of Execut
specified equal opportur
each nonexempt Gover
pertinent part that:

(1) The contract
against any employ
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affirmative action
are employed, and t
during employmen
race, color, religior
Such action shall in
the following: emp
motion, or transfe
ment advertising, la
of pay or other for
selection for traini
ship . . .

(2) The contracto
advertisements for
behalf of the contr
fied applicants will
employment witho
religion, sex or nat

(4) The contracto
visions of Executive

24, 1965,
evant or

(5) The
tion and
No. 1124
regulatio
Labor, or
cess to hi
contracti
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orders . .

Regulation
force and effe
authorizing p
Casualty Co. v
Daeuffer-Libern
570 (3rd Cir.
Revenue, 44 F.
Sackett, 74 F.2
and Associates
1963), *rehearin*
nied, 375 U.S
(1964); *motio*
nied, 377 U.S
F.2d 847, 85
369 F.2d 753
Casualty Co.,

Ridgway Hatche
(N.D. Ohio, 1

The United
issued pursua
tion 201 of Ex
effect of law if
tive Order. *See*

In 41 C.F.R.
that his regu
Order 11246 a
Government
under Governm
this part . . ."

In 41 C.F.R.
the authority
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tive Order 11

In 41 C.F.R
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and subcontracts less than $50,000 and such other contracts as the Director may designate.

17.

In 41 C.F.R. 60-1.4(e), the Secretary of Labor provided that the equal opportunity provision of Section 202 of Executive Order 11246 may be included in every nonexempt contract even though there is no written contract between the agency and the contractor.

> By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order to include such a clause whether or not it is physically incorporated in such contracts. The clause may also be applied by agency regulations to every nonexempt contract where there is no written contract between the agency and the contractor.

18.

In 41 C.F.R. 60-1.5(a), the Secretary of Labor provided that contracts and subcontracts which do not exceed $10,000 per year are exempt from the requirements of the equal opportunity clause.

19.

In 41 C.F.R. 60-1.5(b), the Secretary of Labor provided that contracts and subcontracts for indefinite

quantities (including but not limited to open end, requirement type contracts) are subject to Executive Order 11246 if the amount to be ordered in any given year exceeds $10,000.

20.

In 41 C.F.R. 60-1.45, the Secretary of Labor provided that contracts and subcontracts which were in effect prior to October 24, 1965 (the effective date of Executive Order 11246) and which are subsequently modified after October 24, 1965, are thereafter subject to Executive Order 11246.

21.

The Secretary of Labor's regulations issued pursuant to the authority granted him by Executive Order 11246 (which are published at 41 C.F.R. 60-1 & et seq.) do not conflict with the provisions of Executive Order 11246 and therefore have the force and effect of law. *See, e.g., Maryland Casualty Co. v. United States, supra.*

22.

Executive Order 11246's equal opportunity clause is required by Section 202 of Executive Order 11246 to be included in all nonexempt Government contracts. 41 C.F.R. 60-1.4(e) provides that the equal opportunity clause is "considered to be a part of" every contract which is required by Executive Order 11246 and the regulations issued pursuant thereto to include the

clause "whether or not it is physically incorporated
such contracts." In addition, the Equal Employme
Opportunity provisions of both the Federal Procur
ment Regulations and the Department of Defense Pr
curement regulations provide that Executive Ord
11246's equal opportunity clause is considered to be
part of every Government contract which is requir
to contain the clause regardless of whether it is physi
ally incorporated in the contract [41 C.F.R. 1-12.803
and 32 C.F.R. 12.804(d)]. Therefore, since the Secr
tary of Labor's regulations issued pursuant to Exec
tive Order 11246 have the force and effect of law, eve
nonexempt NOPSI Government contract contains t
equal opportunity clause even though the clause is n
physically included in such contracts [41 C.F.R. 6
1.4(e)].

23.

Where a contract provision is required by statute
by lawful regulation to be included in the contract, t
fact that the provision is not included in the contra
and has not even been agreed upon by the parties, do
not exclude the contract from the provision's cove
age. *See, e.g., G. L. Christian and Associates v. United Sta*
supra, 312 F.2d 418; *J. W. Bateson Co., Inc. v. United Sta*
162 Ct. Cl. 566 (1963); *M. Steinthal & Co. v. Seamans*, 4
F.2d 1289 at 1304 (D.C. Cir. 1971). *See also Russell Mo*
Car Co. v. United States, 261 U.S. 514, 524 (1923); *Coll*
Point Boat Co. v. United States, 267 U.S. 12, 14-16 (192
DeLaval Steam Turbine Co. v. United States, 284 U.S.
(1931); *Monolith Portland Midwest Co. v. Reconstruc*

Finance Corp., 178 F.2d 854, 858 (9th Cir. 1949). Ther
fore, since every nonexempt Government contract
subject to Executive Order 11246 as a matter of la
the fact that defendant NOPSI has never agreed eith
orally or in writing to be subject to Executive Ord
11246 and the rules and regulations issued pursua
thereto, does not remove NOPSI from the coverage
the Executive Order.

24.

The enforcing agency's administrative interpret
tion of a federal statute (or by analogy, its interpret
tion of an Executive Order which has been held by t
courts to have the force and effect of law) is entitled
great deference by the courts. Such administrati
interpretation is presumed valid if consistent with t
purposes of the statute or Executive Order. *See, e.*
Griggs v. Duke Power Co., 401 U.S. 424 (1971); *Udall v. Ta*
man, 380 U.S. 1 (1965); *Power Reactor Co. v. Electricians*, 3
U.S. 396 (1961). *See also Local 189 United Papermakers*
United States, 416 F.2d 980, 997 (5th Cir. 1969), *cert.*
nied, 397 U.S. 919 (1970).

25.

Therefore, the Secretary of Labor's (or his auth
ized representative's) administrative interpretation
Executive Order 11246, as amended, is entitled to gr
deference by the courts and is presumed valid if c
sistent with the purposes of Executive Order 112
See, e.g., Griggs v. Duke Power Co., supra.

26.

Executive Order 11246 and the rules ar
tions issued pursuant thereto provide that
exempt Government contract is subject to
Order 11246. Thus, a contractor is subject
tive Order 11246 and the rules and regulati
pursuant thereto if he has one nonexemp
ment contract.

27.

At the present time, defendant NOPSI
written Government contracts with federal
each of whose value exceeds $10,000 per ye
United States Veterans Administration Hc
United States Public Service Hospital; (3) Uni
Coast Guard Pontchartrain Barracks; (4)
Fleming Training Center; (5) C. O. Naval St
tivity; (6) United States Department of A
Southern Research Laboratory; (7) GSA f
States Customs House; (8) GSA for the Un
Court of Appeals Building; and (9) United S
Port of Embarkation]. None of these contra
ceived an exemption. Therefore, each such
subject to executive Order 11246 and the rul
ulations issued pursuant thereto. *See, e.g.*, 41
1.3(m), 41 C.F.R. 60-1.4(e); 41 C.F.R. 60-
C.F.R. 60-1.45.

28.

Though not formalized by an agreeme
the parties, contracts existed and still exi

NOPSI and the various governmental agen
court's conclusion is premised on the
reasons:

a. The governmental agency involve
quested that NOPSI provide the u
service.

b. NOPSI agreed to provide the service
has continued to supply utility services.

c. The governmental agency involved
NOPSI on a regular basis in consideratio
the utility services received.

Furthermore, the value of each contract
NASA's Michoud Facility; (2) Federal Reserve
United States Army Corps of Engineers, Pr
Millaudon and the River; and (4) United St
Office (Main Branch)] exceeds $10,000.00
None of these contracts has received an e
Therefore, each such contract is subject to
Order 11246 and the rules and regulations is
suant thereto. See, e.g., 41 C.F.R. 60-1.3(m);
60-1.4(d); 41 C.F.R. 60-1.4(e); 41 C.F.R.
C.F.R. 60-1.45.

29.

The contracts for the (1) Veterans Adm
Hospital; (2) Public Service Hospital; (3) Co
(4) Raymond Fleming Training Center; (5) C
Support Activity; (6) U.S. Department of A

(7) U.S. Customs House; and (8) N
barkation each make defendant NOP
contractor subject to Executive Ord
each of these contracts (all of which
24, 1965), was modified after Octob
thus is subject to Executive Order 1
41 C.F.R. 60-1.45.

NOPSI's contract with GSA for t
Court of Appeals Building was exec
has therefore, since its inception, bee
utive Order 11246, thus making de
Government contractor, even thoug
11246's equal opportunity clause is
corporated in the written contract.

30.

In addition to the above contract
fendant NOPSI a Government con
Executive Order 11246, NOPSI's co
referred to in Conclusion of Law 28,
a Government contractor subject t
11246 for the following reasons:

a. The Secretary of Labor's
pursuant to Executive Order 1
the force and effect of law, expr

(1) "Any agreement or
thereof" for the supply of uti
between a Government agen

person" is a Government co
C.F.R. 60-1.3(m);

(2) The equal opportunity
Executive Order 11246 may be
ated by reference into any cont
nated by the Director of OFCC
60-1.4(d); and

(3) The equal opportunity cla
sidered to be a part of every c
quired by Executive Order 11
clude it (i.e., every nonexempt
and the equal opportunity clau
applied by agency regulations
nonexempt contract where th
written contract between the a
the contractor, 41 C.F.R. 60-1

b. On March 15, 1971, GSA s
letter which had the effect of noti
that all of its nonexempt contra
eral agencies, whether written c
were considered by GSA to be su
utive Order 11246, as amended [
tion 202 of Executive Order 1
Opportunity Clause was incor
each such contract]. This adminis
pretation is consistent with th
Executive Order 11246 and th
titled to great deference by the c
Griggs v. Duke Power, supra.

c. In a letter dated July
of OFCC informed defe
a Government contract
tive Order 11246 by virt
equal employment claus
11246 is mandatory an
pensable part of the cont
reference and operati
whether the contract is
between a governmenta
tor not specifically exem
also informed NOPSI t
11246 applies to "any ag
ply of utility services,
NOPSI annually suppli
than $1,000,000 worth c
administrative interpre
with the purposes of Ex
and therefore is entitled
the Courts. *See, e.g., Gr*
supra.

d. The fact that defe
agreed to be covered
11246 does not remove
the Executive Order. *Se*
Associates v. United States,

3

In addition to NOPSI's M
three unwritten contracts

No. 28, *supra*, each also ma
Government contractor sub
11246 for the reasons set fo
and d of Conclusion of Law

32.

Therefore, defendant NOP
tractor subject to Executive

33.

Defendant NOPSI has vi
11246, as amended by refusi
tive Order 11246 and the rul
pursuant thereto.

34.

Where violations of Exe
amended, have occurred, pro
joining of future violations
[Section 209(a)(2) of Executi
correcting, insofar as feasibl
crimination. *See, e.g., United*
145 (1965); *Local 189, United*
416 F.2d 980 (5th Cir. 1969
(1970); *Johnson v. Goodyear Ti*
(5th Cir. 1974); *Pettway v. Am*
F.2d 211 (5th Cir. 1974).

Since the issue of
the issue of substanti
at this time issue an o
should be granted in t
clare NOPSI to be a G
the requirements of E
ed, and will enjoin NO
comply with Executiv
the rules and regulati
court will retain jurisd
issues of substantive
are held. In that regar
ized to begin discov
NOPSI's substantive
11246, as amended,
issued pursuant there

Let the Clerk prep

/s/ FR
UN
JU

New Orleans, Louisi
November 13, 1974.

GENERA

(Numb

This Court havin
Conclusions of Law
ED, ADJUDGED, A

A. The defenda
(hereinafter NOPS
successors, and all p
pation with it are p
ed at its New Orlea

1. Failing or r
Order 11246, as an
after Executive Or
regulations issued p
ant is not exempt
Order 11246 by ord
Labor or his repres
defendant continu
New Orleans, Loui
gas utility services

2. Refusing t
ministration or its
cies access, upon re
ance reviews which
property for the ex

(b) examinati
ords, account
pose of ascer
tive Order 11
date of Execu

B. The pa
covery regard
pliance with
regulations is

C. The U
NOPSI its tax
mination of t
abeyance unti
substantive c
and the rules

D. The C
action for er
which may
plete compli
rules and reg
for a trial re
with Executi
found to be

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Appeal fr
Eastern Dis

Before AI
and HUGHI

AINSWO

Appellant
after NOPS

* Senior Dist
by designation

district court holding that NOPSI is a government contractor subject to Executive Order 11246,[1] and permanently enjoining NOPSI from failing and refusing to comply with the Order, as amended, and the implementing rules and regulations. Questions as to the force, coverage and enforcement of the Executive Order are involved. The principal issue today before us is whether a public utility which, under a city permit, enjoys a local monopoly in the sale of electricity and a near-monopoly in the sale of natural gas and which sells such energy to the Government in substantial amount can be required by the Government to comply with the equal opportunity obligations of Executive Order 11246, even though the utility has not agreed to be so bound. We hold that the Government can compel such a utility to follow the Order; however, we disagree with the district court as to the appropriate remedy.

Executive Order 11246 prohibits employment discrimination by government contractors. The Order was issued by President Johnson in 1965, and requires that all covered government contracts contain a nondiscrimination clause, including an agreement to take affirmative action to achieve the equal opportunity goals of the Executive Order's mandate. *Id.* §202.

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1 30 Fed.Reg. 12319 (1965), 3 C.F.R. 339 (1964-1965 Compilation), *as amended by* Exec. Order No. 11375, 32 Fed.Reg. 14303 (1967), 3 C.F.R. 406 (1969), 42 U.S.C.A. §2000e note (1974), *superseded in part (irrelevant for purposes herein) by* Exec.Order No. 11478, 34 Fed.Reg. 12985 (1969), 3 C.F.R. 133 (1969 Compilation), 42 U.S.C.A. §2000e note (1974).

NOPSI is a public utility which produces, distributes and sells electric power to consumers located in that part of New Orleans, Louisiana, on the east bank of the Mississippi River, and sells and distributes natural gas to consumers throughout the city. The company sells its gas and electricity pursuant to indeterminate permits,[2] like franchises, issued by the City Council of New Orleans. NOPSI is the only company with indeterminate permits to supply New Orleans with gas, and the east bank of the city with electricity. If any New Orleans consumer (including the Federal Government) on the east bank wishes to buy electric service, the consumer must purchase from NOPSI. NOPSI also provides most of the natural gas service to consumers (including the Federal Government) throughout the city, and in those cases where companies receive their gas from other sources, NOPSI has agreed to the arrangement and has built and maintained the transmission line connecting the company with the parish boundary. The federal agencies which buy electricity from NOPSI are on the east bank, and have no alternative source of electric power. NOPSI is regulated by the City Council, which in 1973 granted the company rate increases for its electric and natural gas services to customers.

A number of federal agencies and installations in New Orleans are major purchasers of electricity and

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2 Under an indeterminate permit, the company is granted the right to supply such services indefinitely, but the grantor City Council retains the right to buy the utility operation from the company, thus terminating the permit.

natural gas from NOPSI. In 1973 NOPSI supplied
federal users with nearly $2 million worth of ele
utility service, and with more than $2,680,000 wor
electric and natural gas utility services combi
There are nine federal agencies which at the pre
time and during the period 1965-1973 each hav
ceived over $10,000 annually in combined gas and
tric services from NOPSI; some of those each hav
ceived more than $50,000 in such utility ser
annually. The biggest user, the Michoud Asse
Facility (hereinafter Michoud) of the National A
nautics and Space Administration (hereinafter NA
alone received approximately $1.4 million wort
electricity and natural gas in 1973. The agencie
billed monthly and pay for the services on a re
basis.

According to the district court opinion, NOPSI
plies the Government with utility services pursua
various contractual arrangements. The court f
that NOPSI is supplying 22 federal agencies u
written agreements. Some of those contracts pre
the Executive Order, but the court found that
were modified by, *inter alia*, the 1973 revised rate s
ules which were approved by the City Council;
applied to the particular contract by NOPSI; and
accepted, through payment, by the agency. A fe
those contracts contained nondiscrimination cl
required by earlier Executive Orders. In the case o
agencies in the group, the Government had
NOPSI a proposed new contract, containing the

discrimination clause required by Executive Or
11246, but NOPSI rejected the proposed contract
the ground that the clause was unsatisfactory. Ot
contracts were signed in 1972 or on dates not speci
by the district court opinion and were modified by
revised rate schedules in 1973.

In addition, the district court found that NOPS
supplying six other federal agencies pursuant to c
tracts which were not formal, written agreeme
Some of those contracts, for example, were based
letter requests from the federal agencies; another
based on an oral agreement.

Somewhat more complicated is the relationship
tween NOPSI and NASA's Michoud facility. I
agreement in that relationship precipitated the inst
litigation. NOPSI supplied Michoud with electri
and natural gas under a written contract between
utility and the space agency which was signed in 1
and terminated according to its own terms in J
1970. That contract contained an equal opportu
clause which was required by Executive Order 10
the predecessor of Executive Order 11246. The
tract also contained a limitation clause restricting
scope of the contract to the Michoud operations.
cause of the NASA-NOPSI relationship involving
ities service at Michoud, the Government has tri
the past to review NOPSI's compliance with Exec
Order 11246, but NOPSI has resisted on the gr
that it was not covered by the Order. Attempt

tween the Government and NOPSI to nego
utilities contract for Michoud broke dow
Government unwilling to agree to a scop
like that in the 1965 contract, and NOPSI
agree to an equal opportunity clause with
limitation. Nevertheless, NASA asked NO
tinue supplying Michoud, and NOPSI has c
do so even though the formal contract has e
ject to the rate schedules set out by NOPS
of the termination of the written contract.
court, after surveying the preceding facts,
contract existed between NASA and NOP

The Government's efforts to conduct a
review of NOPSI began in 1969, and fur
cessful attempts were made through 1972.
was initiated by the Government through
Department in 1973 to compel NOPSI's
with the Executive Order. After holding
was covered by the Order, the district co
nently enjoined the utility from failing or
comply with the Order and implementing
The injunction reached NOPSI's refusal
Government to conduct compliance review

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3 The facts indicating the circumstances under
supplied energy to the various government agenc
fully in the district court's opinion, and are incorpor
cept insofar as they indicate specific contractual arr
tween NOPSI and the Government. The long-s
purchaser relationship indisputedly makes NOPSI
contractor, and further contractual underpinning
for our holding.

and authorized the parties to begin discove
tion, the court retained continuing jurisdicti
tuate NOPSI's full compliance with the
Order.

I. The Validity and Applicability
the Executive Order

A. The Executive Order Program

The Executive Order requires that e
exempt government contract contain a cl
which the employer agrees not to discr
employment on the basis of race, color, relig
national origin, and further agrees to take
action to achieve the equal opportunity obje
Order No. 11246, §202(1). The Secretary
responsible for the administration of the f
tract compliance program, and is empowe
rules and regulations to implement the Ord
In addition to the nondiscrimination cla
quired contract provision stipulates that t
tor will comply with all provisions of the O
implementing rules and regulations, *id.* §20
will furnish all the information and repor
by the Order and the regulations and that
mit acces to his books and records by the
agency and the Secretary of Labor in ord
may determine his compliance. *Id.* §202(5

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4 Section 203 of the Order requires the filing of
ports by the contractor.

The Secretary of Labor is gi
under sections 205 to 208 to carry
cluding the authority to investig
practices of government contrac
where the Order sets out various
ties, one of which is that the Sec
recommend to the Justice Depart
by appropriate proceedings, inclu
tive relief, the provisions of the r
nation clause. *Id.* §209(a)(2). Befc
are initiated, though, the Order
rules and regulations prescribed
Labor," the contracting agency sl
efforts to achieve compliance by "
tion, mediation, and persuasion."

For purposes of the instant cas
disputed — provision of the fed
ance program is found in the Sec
ulations, 41 C.F.R. §60-1, *as am*
3454, *et seq.* (1977), and states:

> (e) *Incorporation by operation*
> operation of the Order, t
> tunity clause shall be conside
> every contract and subcont
> the Order and the regulatio
> include such a clause whe
> physically incorporated in s
> whether or not the contr
> agency and the contractor i

§60-1.4(e).[5] *Cf. id.* §60-1.4(d) (incorp
ence). The "equal opportunity clause"
regulation is the nondiscrimination c
the Executive Order. "Contract" me
ment contract," and "government co
to include "any agreement or modifi
tween any contracting agency and a
furnishing of supplies or services."
term "services," as used in the regula
ity services. *Id.* Executive Order 1124
202 that the Order applies to every
tract entered into after the effectiv
contract is specifically exempted und
such exemption is applicable in t

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5 We note that, although certain changes ir
occurred as a result of the 1977 amendment
today would be the same whether or not the
in effect. Furthermore, we would apply the
regulations in any event, since this appeal
gram requiring present compliance by NOP
junctive order of the district court.
The language of the provision cited in the
flects a minor change. The Labor Departm

> The effect of the change in §60-1.4(e)
> that, consistent with the intent of the
> existing case law, the equal opportu
> sidered a part of all nonexempt contr
> written contracts. . . .

42 Fed.Reg. 3454 (1977).

6 Section 204 of the Order provides that
may grant an exemption to a specific cont
circumstances," or may exempt

> facilities of a contractor which are i
> arate and distinct from activities of
> lated to the performance of the cont

Therefore, assuming no
Order's basic validity or its
is clearly subject to the req

B. NOPSI's Argument

NOPSI argues that the Ex
ulations do not give the Lab
Federal Contract Compliance
ministers the Executive Or
the company to fulfill the
tions of the program. In sup
offers three arguments wh
the regulations as herein a
view of both executive powe

First, NOPSI points out
Government's business or a
NOPSI contends that the re

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such an exemption will not i
effectuation of the purposes
No such exemption has been gr
also provides for a class exemptio
tracts involving less than specifie
which exceeds $10,000 (or a cont
having an aggregate total of g
twelve-month period in excess c
section 204(3) from the require
clause. 41 C.F.R. 60-1.5, 42 Fed
fore, NOPSI is a nonexempt con
Order causes no problem since t
lationship which, in particular i
modified by the parties since su
infra.

the Executive Order all invol
the Government's business,
ment contracts, or were un
contractors, and that each c
element of consent which is
company argues that it ha
accept the Order's affirmati
argument, related to the firs
NOPSI's consent in order fo
by the nondiscrimination c
tends that it is not furnishi
ment pursuant to any contr
ing such energy pursuant to
the City, which require NO
consumers who request it
NOPSI's status as a City fra
ing the status of a Federal
given the fact that NOPSI h
contract terms required by
ingly, NOPSI and amicus
Company, appellant in No.
F.2d 480, the companion ca
day, challenge the applicati
both on the ground that it
tual principle of consent,
without authority from Co

C. The Program's Force

The starting point of ou
lished proposition that the

effect of law. *Souther*
1971, 327 F.Supp.
1972); *Joyce v. McCra*
U.S. v. Local 189, Un
La., 1968, 282 F.Sup
v. Secretary of Labor, 3
404 U.S. 854, 92 S.
Texas Instrument, Inc.,
nied, 389 U.S. 977,
volved predecessor
phia Elec. Co., 3 Cir
10925 and prior or
our ultimate conclu
the Order to NOP

This circuit has h
predecessor of No.
utory authority be
the anti-discrimina
purposes of 40 U.S
inter alia, governm
F.2d at 632 n. 1. M
cluded that that s
plied authorizatio
Order today befor
curement. *Contracte*

Additional indic
Labor Department
cussed below, and
for the Executive

pute, 41 C.F.R. §6
(1977), as well. Tha
ment regulation wh
Congress and by th
administration of th
law if it is not in con
vision. *Maryland Cas*
349, 40 S.Ct. 155, 1
Christian & Assoc. v. U
160 Ct.Cl. 1, *cert. de*
L.Ed.2d 314. We p
stant case.

Furthermore, the
lation's validity is w
the Executive Orde
at 175. In deciding t
ence to the Labor D
Order which that d
ter. *Id.*; *see Udall v. T*
L.Ed.2d 616 (1965);
424, 433-34, 91 S
(1971); *Power Reactor*
Radio & Mach. Worke
1535, 6 L.Ed.2d 9
specifically authori
regulations by the
puted provision, 41
than give teeth to
ulation was thus
directive in so imp

principles
pretation,
in the sco
NOPSI.

D. Exe

As indica
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F.2d at 169. E
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9664, 3 C.F.R
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powers, issue
tending Exec
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tractors Ass'n,
hower issue
contract com
orders were
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President K
C.F.R. 448(1
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Although the Labor Department's federal contract compliance program originated by Executive Order, rather than by legislation, Congress has considered the program on several occasions. At the least, there has been implied congressional approval of the program; it can even be argued that there has been express ratification. The Government correctly identifies three sources of legislative authorization for the Executive Order.

First, the President has express authority over direct federal procurement practices, under 40 U.S.C. §486(a).[7] While some presidents acted pursuant to their war powers in promulgating Executive Orders concerning employment discrimination by government contractors, the President's broad statutory procurement power has been held to be authorization for other Executive Orders which were not related to war production. *See Contractors Ass'n, supra,* 442 F.2d at 169-71; *Farkas, supra,* 375 F.2d at 632 n.1. Furthermore, more recent decisions involving Executive Order 11246 have

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7 That provision authorizes the President to prescribe policies and directives to implement the Federal Property and Administrative Services Act of 1949, which deals with the management (including the procurement) and disposal of government property. Mississippi Power & Light argues that, assuming *arguendo* the validity of the Executive Order with respect to the procurement statute, the Order is nonetheless invalid under the Administrative Procedure Act, 5 U.S.C. §500, *et seq.*, for lack of both publication of the Order and notice of a hearing. Mississippi Power & Light apparently relies on 5 U.S.C. §553. However, as the Government points out, rules relating to public contracts are expressly excepted from the requirements of that provision. *Id.* §553(a)(2).

candidly acknowledged the validity of the use by the President or Congress of the procurement process to achieve social and economic objectives. *See Rossetti Contracting Co. v. Brennan*, 7 Cir., 1975, 508 F.2d 1039, 1045 n.18; *Northeast Const. Co. v. Romney*, 1973, 157 U.S. App. D.C. 381, 485 F.2d 752, 760. Those cases stand for the proposition that equal employment goals themselves, reflecting important national policies, validate the use of the procurement power in the context of the Order.

The second source of legislative authorization is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* A reference in the Act, as originally enacted, *id.* §2000e-8(d), to the Executive Order program indicated congressional intent that the program would continue in existence. *See Contractors Ass'n, supra*, 442 F.2d at 171. This reading of congressional intent is further supported by the decision of Congress at that time not to make Title VII the exclusive federal remedy in this area. *See* 110 Cong. Rec. 13650-52 (1964); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *Sanders v. Dobbs Houses, Inc.*, 5 Cir., 1970, 431 F.2d 1097, *cert. denied*, 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971).

Third, the debates surrounding the Equal Employment Opportunity Act of 1972, Pub.Law No. 92-261, 86 Stat. 103, which amended Title VII, offer additional evidence of congressional approval. For example, legislative sentiment in support of the Executive Order pro-

gram surfaced in successful opposition to a rene
attempt to make Title VII the exclusive federal r
edy. *See* 118 Cong.Rec. 3371-73 (1972) (remarks of S
ator Williams); *id.* at 3962, 3964 (remarks of Sen
Javits). Additional support can be inferred from th
feat of a proposal to transfer the program to the E
Employment Opportunity Commission. *See id.* at 1
98. Other aspects of the Act which were enacted
law illustrate congressional contemplation of the
gram's continuance. *See, e.g.*, 42 U.S.C. §§2000e
2000e-17. To be sure, the legislative history does
show, in so many words, congressional ratificatio
the particular aspect of the Executive Order prog
here at issue, *viz.*, the imposition by operation of
Order of the nondiscrimination clause on all gov
ment contractors, regardless of whether the emp
ers have expressly consented to the clause. Howe
Congress not only has refused to circumscribe the
of the Office of Federal Contract Compliance in
bating employment discrimination, but has indica
concern for the efficacy of such efforts and an in
that they would continue. The regulation in cor
versy is an integral part of a long-standing pro
which Congress has recognized and approved. We
no difficulty, therefore, in finding congress
authorization for the provision.[8] It follows tha

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8 NOPSI argues that application of the Executive Order h
contravenes the principle in *Youngstown Sheet & Tube Co. v. S*
343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), in whic
Supreme Court held that President Truman's seizure of th
mills was unlawful. In *Youngstown*, however, Congress h

fused to authorize governmental seizure of property as was the
in attempted. Therefore, the President had acted in the face of t
congressional decision and in the absence of any other pov
authorizing his action. *See* 343 U.S. at 585-89, 72 S.Ct. at 866-
The instant case is thus distinguishable, since the Executive ac
here pursuant to congressional authorization. The applicatior
the Order today before us falls within the first category of exe
tive power — that of maximum power — which Justice Jack
identified in his concurring opinion in *Youngstown*, 343 U.S. at 6
37, 72 S.Ct. at 870-71; *see Contractors Ass'n, supra*, 442 F.2d at 168-
Furthermore, the analogy to a seizure is manifestly imprecis

At oral argument, NOPSI also cited *NAACP v. FPC*, 425 U
662, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976), in which the Supre
Court held that the Federal Power Commission did not h
authority under the Federal Power Act and the Natural Gas Ac
issue a rule prohibiting discriminatory employment practices
the agency's regulatees. However, *FPC* does not aid appella
position. The opinion does not hold that an agency cannot is
regulations concerning affirmative action, assuming the age
has a statutory basis for doing so, nor does it suggest that is
ance of such regulations is prohibited unless Congress has auth
ized the agency to promulgate them. Furthermore, the Court
hold that the FPC indirectly could regulate discriminat
employment practices by its regulatees, to the extent that s
practices demonstrably affected a regulatee company's labor co
Id., 425 U.S. at 666-670, 96 S.Ct. at 1810-11. Therefore, un
FPC, a government agency can regulate discriminatory empl
ment practices to the extent that such discrimination is rel
directly to the agency's functions. That principle should be rea
light of *Rosetti Contracting* and *Northeast Constr.*, which involve
Executive Order herein and require only a loose relationship
tween the noneconomic objective, *i.e.*, regulating employment
crimination, and the procurement function. *Rosetti Contrac
supra*, 508 F.2d at 1045 n.18; *Northeast Constr., supra*, 485 F.2d at
61. We also note Mississippi Power & Light's citation of *Hampt
Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (19
apparently to rebut the proposition that Congress ratifies ex
tive orders by subsequently recognizing their existence and r
ing reference to them. However, to the extent that the Supr
Court addressed this issue in *Mow Sun Wong*, the opinion turne

application of the Order to NOPSI is also a
for such action requires no extension of t
tion's coverage. The regulation incorporati
ation of the Order the nondiscrimination
every government contract would be a dead
Government could not apply it to a gover
tractor like NOPSI, merely because the co
fused to consent.

Although no circuit has confronted the p
issue today before us, we find the *Contractor*
to be a very persuasive precedent. There the
cuit specifically considered the validity of th
phia Plan, relating to minority hiring in

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the particular facts in controversy. That case invol
the question whether acquiescence by the Executi
gress in a Civil Service Commission policy imposing
requirement on federal employees was sufficient to g
mission rule the same support as an express statut
dential command. The Court held that neither appro
nor executive orders in which Congress and the P
spectively, had considered the policy and spoken
fashion could fairly be read as evidencing either ap
approval of the policy by either branch. *Id.* 426 U.S.
S.Ct. at 1906-10. The opinion makes clear, though,
lative history and executive orders there in disput
ably be taken either way, *i.e.*, they might be read
either disapproval or approval, and it was that am
gave rise to the Court's statement. Thus, *Mow Sun*
distinguishable from the case at bar. The legislati
hind the program today before us lacks such aml
tated the *Mow Sun Wong* result. Furthermore, the cit
the clear directive from the Executive — by Execu
which is the very source of the program we confro
herein.

assisted construction projects, which wa
gated pursuant to Executive Order 11246.
upheld the Plan, on the ground that it was
implied authority of the President. Insofar
adelphia Plan was instituted to implement
date of the Executive Order in a particular
area and industry, the court's holding clea
from a view that the Executive Order pro
was valid, at least with respect to federal
construction contracts. Moreover, in langu
fours, the Third Circuit specifically stated t
tive imposition of nondiscrimination cont
sions (including an affirmative action cla
Government procurement area is action p
the express or implied authorization of Co
F.2d at 170.

In response to the argument that a decis
Government in this case would go beyon
Circuit's holding in *Contractors Ass'n*, we belie
decision today fits within that precedent a
approves a more confined power than did
tors Ass'n court. We here impose the nondis
obligation on a company which, as a public u
City-granted franchises and, pursuant the
joys special economic advantages, includin
oly, and (2) sells directly to the Governm
apply the provision is far easier, in our judg
to apply it, as in *Contractors Ass'n*, to a mer
federally-assisted construction project co
ease of application is a function of both t

ment's legal power and the utility's
their direct contractual relationshi

E. Contract Law

The second aspect of NOPSI's at
tive Order as herein applied focus
The company contends that its la
bound by the nondiscrimination c
the prior cases involving the vali
Whatever, if any, authorization exi
is vitiated when, as here, it is imp
senting public utility, the company
contractual consent principle is vic

We find that the absence of NOI
Executive Order is not determina
render the prior caselaw disting
more, we reject the company's con
is not a government contractor.

Government contracts are diffe
between ordinary parties. *See M.*
mans, 1971, 147 U.S.App.D.C. 221,
See also Vacketta & Wheeler, *A G*
Right to Abandon Performance, 65 Geo
Government has the unrestricted
those with whom it will deal, and
conditions upon which it will mak
Perkins v. Lukens Steel Co., 310 U.S. 1
876, 84 L.Ed. 1108 (1940); *South*

Ogilvie, S.D. Ill., 1971, 327 F.Supp. 1
680 (7 Cir., 1972); *cf. King v. Smith*, 392
2128, 20 L.Ed.2d 1118 (1968); *Vacket*
Agreement to such conditions is ur
regulations apply and require the i
tract clause in every contract, the c
ated into the contract, even if it has r
included in a written contract or
parties. *M. Steinthal, supra*, at 1304;
United States, 1963, 162 Ct.Cl. 566, 5
supra, 312 F.2d at 424; *see Russell Mot*
States, 261 U.S. 514, 43 S.Ct. 428, 67 L
also De Laval Steam Turbine Co. v. United
52 S.Ct. 78, 76 L.Ed. 168 (1931); *Colle*
United States, 267 U.S. 12, 45 S.Ct.
(1925).[9]

A contractual relationship obviou
NOPSI and the Government, not
company's attempt to disclaim gov
tor status. This contractual relatior
tue of the fact that the company sell
worth of utility services to various a
eral Government, and has done so f
district court's extensive factual fin

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9 A contract between the Government a
tors need not be in writing in order to b
Patten, *Government Contracts — Are They Enfo*
Pub. Contract L.J. 232 (1975). Similarly,
Executive Order to NOPSI does not depen
a formal written contract. We do not say
tract exists between NOPSI and the Gov
tion of that question is unnecessary to o

lar contracts aids us in this
would reach it even in the
ten agreements to particul
tionship so clearly reflects

Furthermore, we cannc
seriously can deny status
for the reason that it is sup
Government pursuant to
quire the company to furn
sumers who request it. Th
tomers under local franchi
vious fact that NOPSI re
vidual customers pursua
written or parol, and whet
parties' course of dealing.

NOPSI's status as a publi
cal franchises granted by t
providing services to the
utility's express consent
Executive Order. Acceptai
cal franchises subjected
attached thereto. *Cf. Almi*
U.S. 266, 271, 93 S.Ct.
(1973). When NOPSI und
gations by selling energy t

pany did so according to th
Government.[10]

NOPSI implies, in additio
lic-utility status, imposition
requirements would be unf
company suggests, stems fr
as to whether to accept the
However, the fact that NOP
tates strongly in *favor* of allo
impose the obligations of th
company. NOPSI's franchise
in the sale of electricity and a
of natural gas. A monopolis
unlike a seller in an ordinary
power to resist the Executiv
under consideration, the G
electric energy in the New Or
allowed to prevail in its cont
would have to either acqu
necessary services. Obvious
force such a dilemma upon
wise, a valid and important

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10 We are not inferring here any
ment by NOPSI to the terms of th
is dictated by (1) the sale by the co
ment, *and* (2) the fact that such sal
pany which, under City franchise
such services needed by the Gov
those elements triggered the regu
thus, the application of the progr
the Order.

gram, set in place by
tury ago, continued
proved by Congres
contractors, could
monopoly in a serv
the Government, j
nomic position. He
because of local l
clause of the Cons
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Government can c
equal opportunity
11246, even thoug
consented to be bo

II. NOPSI's Fo

NOPSI next cont
implementing regu
ment when applie
seek to do business
consented to the p
ment parallels the
case, and is similar

Section 202(5) o
all covered gover
whereby the contr
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menting regulatio
contractor's) book

agency and the Secr
mine whether the c
program. That prov
§60-1.43, requiring

> permit access du
> its premises for
> site compliance
> copying such b
> other material
> matter under ir
> compliance with

NOPSI contends tha
herein would consti
seizure, in contraver
City of Seattle, 387 U.S
(1967). The compan
development by the
search doctrine, not
dents. *See, e.g., Unite*
632, 70 S.Ct. 357,
Pub. Co. v. Walling, 3
614 (1946).

In *See* the Court a
rant requirement t
premises, in the
enforcement inspec
unconsented admin
areas of a comme

pe..ed throu
framework
545, 87 S.Ct
out that it d
techniques
spections pr
product." *Id.*

The Cour
Catering Corp.
L.Ed.2d 60 (
authority to
and inspecti
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the Court h
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conducted p
397 U.S. at

The Supr
States v. Biswe
87 (1972),
arms dealer
Biswell the
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tem there

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situation we

that the sys
interests are
the regulato
1596. The s
The Governi
employment
gram is desig
regard to t
some sort of
for the inspe
for access to
make the pr

The *Biswe*
submission t
tion for upl
legality of th
authority of
S.Ct. at 159
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earlier in thi
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law, were i
curement a
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validating r
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choosing to
and to acce

edge that it would be subject to inspection. *Id.*, 406 U.S. at 316, 92 S.Ct. at 1596. Obviously, we do not find actual consent to the inspection system at bar. However, there is no policy justification for distinguishing between, on the one hand, a federally-licensed firearms dealer and, on the other, a public utility which, under City-granted franchises, enjoys a local monopoly and sells substantial amounts of energy to the Government, thus bringing the utility within the coverage of the federal contract compliance program. Therefore, we have no difficulty in applying, for fourth amendment purposes, the implied-consent concept of the cases involving administrative inspection of regulated businessmen, *see, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 271, 93 S.Ct. 2535, 2538, 37 L.Ed.2d 596 (1973), even though that concept is a legal fiction. Our reasoning is consistent with the rule earlier announced in this circuit that where, as here, the Government validly regulates any business, the Government has a right to include in its regulations the requirement that certain records be kept open to official inspection so that the administrative agency can determine whether the company is complying. *See Ray v. United States*, 5 Cir., 1967, 374 F.2d 638, 641-42 (*citing* 79 C.J.S. Searches & Seizures §36, at 803), *cert. denied*, 389 U.S. 833, 88 S.Ct. 35, 19 L.Ed.2d 94 (1967); *cf. Morton Salt, supra; Oklahoma Press, supra.* We note finally that, under the inspection procedure contemplated by the Executive Order program, "the possibilities of abuse and the threat to privacy are not of impressive dimen-

sions," *see Biswell, supra*, 406 U.S. at 317, 92 S.Ct. at 1597, and accordingly, we sustain the program against attack on fourth amendment grounds.[12]

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12 Mississippi Power & Light argues that the Executive Order's provision for Government access to a contractor's books and records is unconstitutional because: (1) the provision is without statutory authorization, and (2) it does not contain a procedure for judicial review. The argument about lack of statutory authorization is without merit in light of the pattern of congressional approval for the Executive Order program which we found in section I of this opinion. The argument about lack of judicial review is also without merit since, in the setting of the instant controversy, it is purely hypothetical. Here there has been no attempt to obtain access by force to the company's records without judicial approval; in fact, there has been ample judicial review in these proceedings of the Government's attempt to conduct a compliance review of NOPSI.

Since oral argument, Mississippi Power & Light has called our attention to *Brennan v. Gibson's Products, Inc.*, E.D. Tex., 1976, 407 F.Supp. 154, *appeal docketed*, No. 76-1526 (5 Cir. Feb. 27, 1976), a case in which a three-judge court held that an attempt by Department of Labor officials to conduct a warrantless inspection of a business, pursuant to the Occupational Safety and Health Act of 1970, violated the fourth amendment. However, *Gibson's Products* does not deter us from the conclusion we have reached. As the three-judge court pointed out, the company involved there was not licensed and had no history of close regulation, and the statutory provisions which appeared to authorize the search were not limited to such businesses, but instead embraced "the whole spectrum of unrelated and disparate activities which compose private enterprise in the United States." *Id.*, 407 F.Supp. at 161-62. Furthermore, there was no reason to believe that the thing sought to be controlled by the regulatory system before the court existed in the area to be searched. *Id.* at 162. Therefore, *Gibson's Products* is manifestly distinguishable from both the instant case and those cases upon which we have relied.

III. The District Court's Injunctive Order

We turn finally to NOPSI's disagreement with district court's injunctive order. The company arg that the court lacked jurisdiction to issue that orc under which the court retained jurisdiction over t action for the purpose of enforcing the substant provisions of the Executive Order.

We hold that, the district court having found NO to be covered by the Executive Order, the task of taining NOPSI's compliance with the program sho be left to the Government's own administrative cc pliance processes. Accordingly, we modify that par the district court's opinion which retained jurisdict over this suit and which dictated a mandate of inju tion clearly contemplating substantive enforcemen the Executive Order. Our decision is based on eq able considerations, and should not be read as holc that the district court lacked jurisdiction in any res for its ruling. Resolution of NOPSI's objections to court's injunctive order is therefore unnecessary to holding; however, we proceed to dismiss all of the c pany's present objections in order that they may nc interposed again as obstacles to enforcement of program herein.

NOPSI makes two major arguments in this re The first is that the Government has failed to fc the procedural requirements of the Executive C and implementing regulations. NOPSI alleges tha

Government was required to proceed by concilia
and persuasion, but instead chose to pursue litiga
in its compliance strategy. In addition, NOPSI
tends that the Government has failed to afford
company a hearing mandated under the progran
support of these assertions, NOPSI relies on a nun
of regulatory provisions. We need not respond to
assertion specifically, in view of the fact that
Government's attempts to conduct a voluntary c
pliance review of NOPSI date back to 1969.

The regulations now in effect[13] provide for th
stitution of administrative *or* judicial enforcement
ceedings in response to violations of the Execu
Order. Violations may be found, based upon, *inter*

> (iv) a contractor's refusal to submit an affirm-
> ative action program; (v) a contractor's re-
> fusal to allow an on-site compliance review to
> be conducted; (vi) a contractor's refusal to
> supply records or other information as re-
> quired by these regulations . . . or (vii) any
> substantial or material violation or the threat
> of [such] a . . . violation of the contractual pro-
> visions of the Order, or of the rules or regula-
> tions issued pursuant thereto.

41 C.F.R. §60-1.26(a)(1). The district court found
a violation. The regulations further provide that w

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13 *See* note 5 *supra*.

ever the Director of the Office of Feder
Compliance has reason to believe that the
threat or fact of violation of the Order or
the Director

> may institute administrative enfor
> proceedings . . . *or* refer the matter
> Department of Justice to enforce the c
> tual provisions of the Order, to seek
> tive relief . . . and to seek such additi
> lief, including back pay, as may be ap
> ate. *There are no procedural prerequisites to a r*
> *the Department of Justice* by the Director, *a*
> *referrals may be accomplished without p*
> *through the conciliation procedures* in this c
> *and a referral may be made at any stage in the p*
> under this chapter.

Id. §60-1.26(a)(2) (emphasis added).

The preceding regulation plainly rebu
first contention.[14] And the regulation

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14 As to NOPSI's argument that the Governmer
to proceed by conciliation and persuasion, we thin
described at the outset of our opinion indicate th
took place. In addition, we find no conflict betwee
1.26(a)(2) and section 209(b) of the Executive Orde
209(b) directs the contracting agency to make rea
to achieve compliance by conciliation and persuasio
are to be made pursuant to the regulations issue
tary of Labor. *Id.* Thus, section 60-1.26(a)(2) qualif
ment's responsibilities under section 209(b) of th
than vice versa, and the two provisions can be re

NOPSI's second major assertion, which is tl
tice Department cannot bring judicial pro
enforce the provisions of the Executive Ord
OFCC or the compliance agency (here tl
Services Administration) has first exhaus
ministrative procedures of the program.
observations are in order as to the exhau
ment. First, the cases cited by NOPSI in sup
contention involve private actions and are
inapposite to the situation where the Gov
self has decided to pursue judicial litigatio
ing Executive Order 11246.[15] Second, whil
nize that, as NOPSI argues, substantial arg
be mustered for application of the exha
trine, we nevertheless have no reason to
haustion requirement into a program which
deliberately provides judicial enforcement
native to administrative enforcement, an
plicitly rejects procedural prerequisites
enforcement.

Despite our conclusion that the distric
both the jurisdiction and the power to direc
tive order NOPSI's compliance, we conclu
enforcement function in this case would b
ried out administratively by the complian
This decision is reached in the exercise of o

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15 For example, to the extent that the exhaustic
rooted in notions of deference to the administrati
the administrative agency, the argument has no be
stant context.

discretion, for "the manner, means
solving" this dispute must be devis
equitable principles." *R. L. Johnson*
Rubber Co., 5 Cir., 1974, 491 F.2d 13
of our holding that NOPSI is cover
Order and has violated it, our prim
point, of course, is to render such r
and appropriate to effectuate the m
utive Order as fully and expedit
However, the relief imposed shou
the grain of fundamental fairness v
fully be the outcome of any equit
1379. In the particular setting o
NOPSI has never agreed to be bou
believe that fundamental fairness
Government, armed this time wit
ion, now obtain the company's vo
before calling for the support of ou

Other equitable factors support t
approach of the Executive Order
mented, is enforcement by Executi

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16 *Johnson* is one of the cases cited by th
proposition that the district court's reten
injunctive order were justified. While thos
district court had the authority to take the
conclusion we do not dispute -- they in n
district court's injunctive order was re
stances before us. Since we have conclude
will best effectuate the Executive Order, d
is unnecessary.

ticular the Department of Labor,
Order itself provides the judicial enf
tive in section 209(a)(2). The Execu
which this court lacks, in the admini
gram, and that expertise can profit
bear on the problem at bar. Further
to burden our scarce judicial resourc
supervising the enforcement of th
compliance program, unless such ju
becomes necessary.

Our decision today is not an invita
lay by NOPSI in complying with th
Such delay would be intolerable. I
states:

> If a court of final appellant (s
> holds the District Court deter
> NOPSI is a government contra
> standing its refusal to consent
> tual equal opportunity provisi
> tive Order 11246, the Genera
> ministration and OFCC sh
> afforded the opportunity to wo
> in developing an appropriate
> tion program, if indeed one i
> sary. . . .

Brief for Appellant at 46-4
lies the remedial approach
assume, based on the quo
faith in complying with th
that the company is cover

To restate our decisi
government compliance a
GSA — may proceed by
tain NOPSI's compliance
Though we are removing t
district court, our decisio
negotiations between the
cided herein are preclude
The company cannot any
under the Executive Or
attempt to nullify the effe
by demanding limitation-c
tract or proposed affirm
would restrict the impac
NOPSI has no valid four
the Government's dema
company's facilities or to t
ords, nor can NOPSI fu
ance by insisting on mer
procedural niceties.

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17 NOPSI's statement sugge
tive action program might not
regulations, however, to requir
gram. *See* 41 C.F.R. §60-1.40(a

The Government may pro
the Executive Order by ad
parties are advised that, havi
the assumption of NOPSI's
with our decision herein, thi
favor on any future attempt

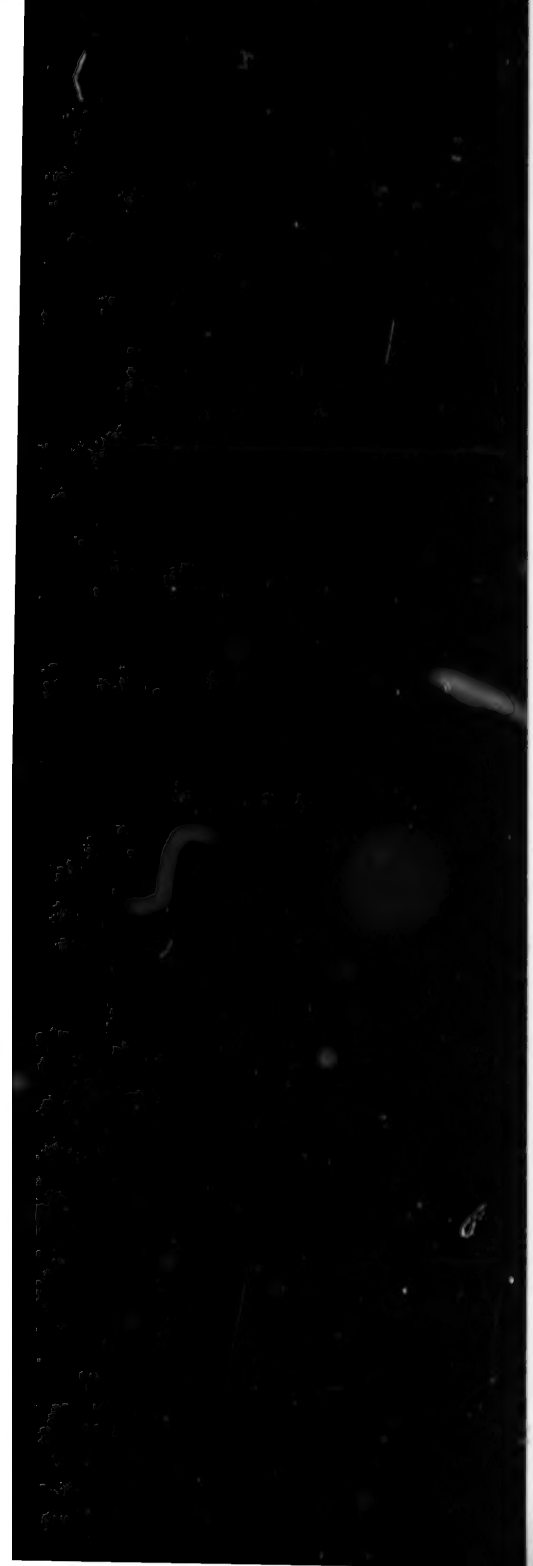
MODIFIED AND AFFIRM

CLARK, Circuit Judge, di

The decisive question in
States v. Mississippi Power & Ligh
1977), which we also decide
eral government may impo
obligation on a public utility
supplies energy to federal i
state law and the terms
franchise. The majority ans
respectfully disagree.

I.

In order to determine wh
Service, Inc. [NOPSI], or Mi
[MP&L] must comply wit
opportunity clause despite
subject themselves to it, thr
First, was the issuance of t
requires that the clause b
contract a valid exercise o



ond, what relation
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lation exist betwe
NOPSI or MP&L?
and third issues f
decision of this ca
puzzles presented

The relation th
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Order when he issue
Fed. Reg. 3454, 3459
tunity clause into all
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2 3 C.F.R. 169 (197

3 *Id.* §§202 & 405.

The first provision c
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affirmative action to
cruiting, hiring, pr
employees during th
contract.[4] Other pro
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extends the obligatio
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Although the Exec
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in its language which
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understood in the la
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The word "contract'
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4 *Id.* §202.

5 While the Executive
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contract, the scope of th
quent sections of the Or
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Osaka Shos
57 S.Ct. 3
son v. Mau
aff'd, 478 U
F.Supp. 8
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6 3 C.F.R

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tan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134, 56 S.Ct. 397, 399, 80 L.Ed.528, 531 (1936). The same principle is applicable here.

Moreover, even if the Executive Order could be read to cover parties to unenforceable agreements or non-contracts, the federal government's position would not be measurably advanced. The Executive Order merely requires contracting agencies to include the equal opportunity clause in their bid lettings and contracts. The supplementary regulation, Section 60-1.4(e), provides only that the clause is in the contract whether or not the agency remembered to put it there. Therefore, it is necessary that an enforceable contract exist between a person and the government if there is to be a basis for the enforcement of the clause. If the clause were placed in a void agreement, it would fail with the rest.

NOPSI and MP&L are public utility companies. Although their arrangements with their respective regulatory authorities are not identical in form,[7] the effect is the same. Because they hold franchises granted by a state or a city, are engaged in an enterprise affected with the public interest, and hold themselves out as being willing to serve all members of the public, both

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7 NOPSI supplies electricity and natural gas to residents of New Orleans pursuant to an indeterminate permit issued by the New Orleans City Council in 1922. MP&L operates under a franchise granted to it by the Mississippi Public Service Commission in 1956.

NOPSI and MP&L have a duty to provide the types of energy they distribute to anyone within their certificated area who requests it and complies with reasonable conditions of service. *Morehouse Natural Gas Co. v. Louisiana Public Service Commission*, 242 La. 985, 999-1000, 140 So.2d 646, 651 (1962); *Capital Electric Power Association v. Mississippi Power & Light Co.*, 218 So.2d 707, 713 (Miss. 1968). In exchange, they receive the right, to some extent exclusively, to supply utility service to customers within their certificated area at a price set by their regulatory authority, and they are guaranteed a reasonable rate of return on their investment.

Since the majority has described the history of NOPSI's interaction with the federal government, only brief recap is necessary here. NOPSI has furnished federal installations with utility service for more than 50 years. In *United States v. New Orleans Public Service, Inc.*, 8 Fair Empl. Prac. Cas. 1089, 8 Empl. Prac. Dec. 9795 (E.D. La. 1974), the court found that NOPSI currently supplied 22 federal facilities with electricity, natural gas, or both. In some instances there is a written agreement between NOPSI and the federal government concerning essential terms, such as the applicable rate and volume of service demanded, while in others the understanding is unwritten. Although most of these arrangements predate the Executive Order, a few were entered into after it became effective. The price term of every agreement was changed as recently as 1973, when the New Orleans City Council revised NOPSI's rate schedule, and on at least one occasion since the

issuance of the Order the government requested received additional service at one of its locations. cently, when NASA insisted that its proposed wri agreement with NOPSI contain the equal opportu clause NOPSI refused to capitulate. Instead, NOPS formed NASA it would continue to supply NA energy requirements at the regulated price as bot franchise and Louisiana law require, but expressl fused to subject itself to the equal opportunity cla

Government contracts do differ from contract tween private parties in some respects, *see* J. Paul, ed States Government-Contracts and Subcont 69-75 (1964), but no such difference affects the r here. Although contracts of the United States governed by federal law, *United States v. Seckinger*, U.S. 203, 210, 90 S.Ct. 880, 884, 25 L.Ed.2d 224, (1970), "[i]t is customary, where Congress has adopted a different standard, to apply to the cons tion of government contracts the principles of ge contract law." *Priebe & Sons, Inc. v. United States*, 332 407, 410-412, 68 S.Ct. 123, 125-26, 92 L.Ed. 32, (1947), *quoted in, Security Life & Accident Insurance Co. v. ed States*, 357 F.2d 145, 148 (5th Cir. 1966). One c

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8 Since MP&L's interaction with the federal governmen tains the same essential elements — written and unw arrangements for service consummated before and after th ance of the Order, changes in the rate applicable to the g ment since 1965, and an express refusal to be bound by the opportunity clause — MP&L stands in the same post NOPSI, and I shall not needlessly prolong this dissent by re ing its course of dealing in detail.

most fundamental of those principles is that t
enforceable, a contract must be supported by valid
sideration. *Estate of Bogley v. United States*, 514 F.2d 1
1033, Ct.Cl. (1976); 1 S. Williston, Contracts §9
367 (3d ed. 1957); 1A A. Corbin, Contracts §114, p.
(1963). There is no reason why this rule should no
ly to contracts with the federal government; at l
one court has assumed that it does. *See United Sta
Marchetti*, 466 F.2d 1309, 1317 n. 6 (4th Cir.), *cert. de
409 U.S. 1063, 93 S.Ct. 553, 34 L.Ed.2d 516 (197

A promise to perform a service which one is unc
pre-existing legal obligation to perform is not valid
sideration for a return promise. *United States v. Br
man*, 173 U.S. App. D.C. 150, 523 F.2d 1099, 1
(1975), *cert. denied*, 425 U.S. 961, 96 S.Ct. 1744
L.Ed.2d 206 (1976); 1 S. Williston, *supra*, §132, p.
1A A. Corbin, *supra*, §171, p. 105. Nor is it merely
return promise that is unenforceable. Because th
turn promise is unenforceable, there is no mutualit
obligation and therefore no contract is ever formed
course, in the event that the party subject to the
existing obligation does more than his duty require
creates consideration sufficient to support the re
promise. 1 S. Williston, *supra*, §132, pp. 558-59; 1
Corbin, *supra*, §192, p. 180.

The application of these principles to the facts of
case is straightforward. Since both NOPSI and M
have a pre-existing legal obligation to supply u
service to the federal installations within their ce
cated area at the applicable rate irrespective of

agreement to do so, their arrangements
eral government were instances of per
their duty to serve customers, not contr
federal government. Moreover, an exami
record reveals that none of the agreeme
the utilities and the federal government
bind either utility to treat the governmer
ently from the way state law obliged it t
customers of equal size. Therefore, neith
government contractor within the me
Executive Order, and neither has an enf
gation to comply with the equal opportu

The majority takes the position that
their franchises, NOPSI and MP&L assu
gation to furnish the federal government
on whatever terms it might wish to impos
requirement that they comply with the
the equal opportunity clause. But there
the record which supports the notion th
utilities or their respective regulatory aut
aware that NOPSI and MP&L were und
an obligation at the time the franchise
were executed. And since the franchise
ments with a state or city rather tha
government, no such obligation can be
matter of law under Section 60-1.4(e)
tions. In addition, both utilities accept
chises long before Executive Order 112
To impose the burden of complying w
opportunity clause on them because of a

ing the Order would be inconsistent with Se
& 405 which indicate that the order is trigger
actions taken after October 24, 1965.

The majority also suggests that because N
MP&L are public utilities it is justifiable to sa
with the record-keeping, expense, and othe
that compliance with the equal opportunity
tails. It contends that to permit them to use
tion as the sole sources of energy within th
cated areas to force the federal government
between bargaining over the inclusion of the
doing without energy, would be inconsisten
Supremacy Clause.[9] The premise of this ar
that the utilities' economic leverage is the
state action, because purely private action c
late the Supremacy Clause. This premise i
ported by the record.

As the Supreme Court recognized in *Jacks*
politan Edison Co., 419 U.S. 345, 351 n. 8, 95
454, 42 L.Ed.2d 477, 484 (1974), where it
public utility's termination of service to a cu
not constitute state action for Fourteent
ment purposes, "public utility companies
monopolies created by the economic forc
threshold capital requirements and virtuall
economy of scale." *See* 2 A. Kahn, The Ec
Regulation: Principles and Institutions 119

9 U.S. Const., Art. VI, cl. 2.

It is therefore unlikely that NOPS
greater competition at the time
franchises than they do today, an
the record to show that they did. If
granting them franchises their r
authorities did little more than ac
existing positions as the sole supp
in their certificated areas. It appe
economics rather than those of a s
for NOPSI and MP&L to amas
possess.

The facts of this case present no
franchises and the Executive Or
were created to ensure that a d
energy would be available to i
Orleans and Mississippi at a regul
federal government has availed its
this policy by requiring the utilit
service under and in accordance w
franchises, just as any other inha
validity of the franchises and the
tended to serve have not been c
affirmed. This is not a case in
authority or a franchise holder ha
to bar the United States from
energy or from contracting with
the franchise holder as a source o
United States shown that it is im
be otherwise obtained. At most
gests that the franchise holders

terms of their franchises are the ch
energy within their certificated
government cannot have the best
priced energy and a contract vehic
equal opportunity clause enforceabl

II.

Had the court adopted the positi
the effectiveness of the Executive
eliminating discrimination in emplo
have been destroyed. The vast maj
plying goods and services to the fe
are not under a pre-existing legal obli
rather are contractors within the
Order. Nothing said here would
bility of the provisions of the equal
to them. Nor would such a decisio
ties at liberty to treat their employe
They are subject to a plethora of
measures designed to elimina
employment practices.

I do not dissent to defend discr
ment practices. But when the gove
to attack them through the mecha
non-discrimination clause in its co
by enacting a statute, there are li
accomplish. Those limits have been
majority makes a mistake when it
ment to forge ahead to a desirable
stand the law of contracts on its h

APPEN

UNITED STATES I
DISTRICT OF M

PERINI COR
PERINI-KING,
and DAVID

v

MASSACHUSETTS BA
AUTHORITY, ROB

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MEMORANDU

McNAUGHT, D.J.

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Perini-King, a joint v
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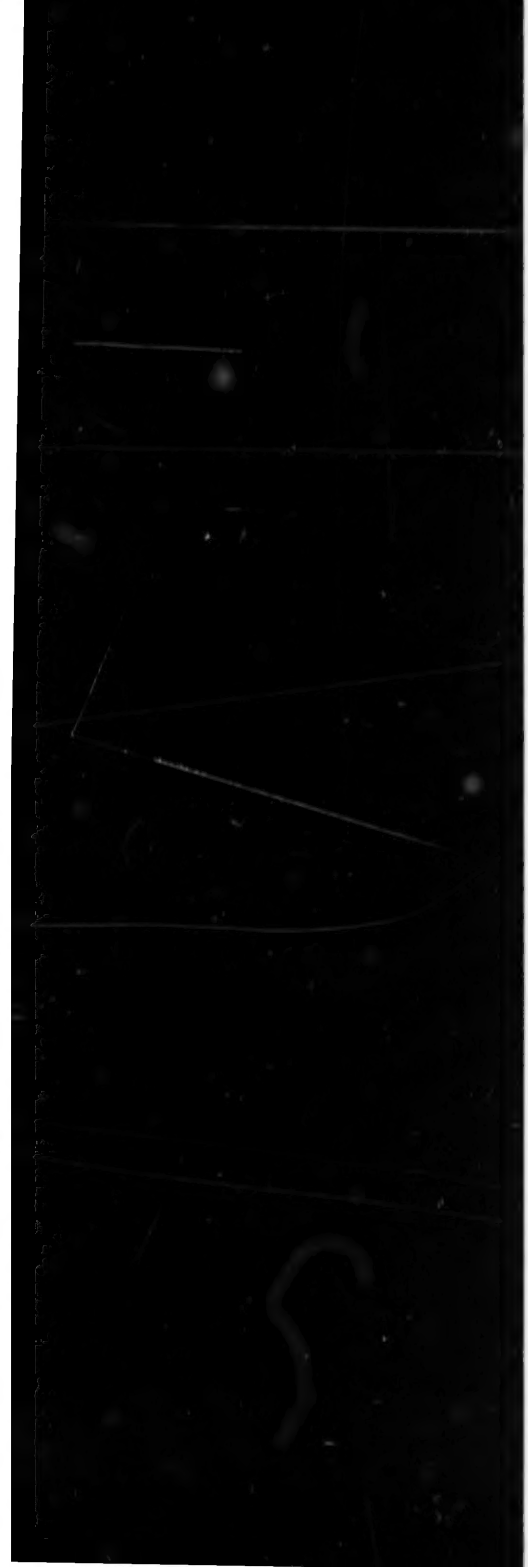

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Slip Opinion, p. 5.
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The Goal.

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general, comprehensive program of facilitating reasonable minority participation in the award of governmental contracts." Such a goal, in and of itself, was endorsed by Congress in the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2). Viewed in a vacuum, the ultimate end to be achieved is a laudatory one: the elimination of discrimination.

The Competency of the Authority to make Findings.

As stated, in *Bakke*, the State has a legitimate, substantial interest in ameliorating, or eliminating where feasible the disabling effects of identified discrimination. *Bakke, supra*, at 307. Findings of constitutional or statutory violations must be made by judicial, legislative, or administrative bodies with authority. Without authorized findings of violations, the government has no greater interest or compelling justification in helping one individual than in refraining from harming another. *Bakke, supra*, at 309. The University of California Regents were held incompetent to make requisite findings. According to *Bakke*, a "governmental body" must have the authority and capability to establish findings. The general purpose of eliminating discrimination is not enough. The MBTA was established under Mass. Gen. Laws, c. 161A, as "a body politic and corporate and a political subdivision of the Commonwealth." Does it have the authority and competency to make the findings which must provide a basis for any tailored classification? As a political subdivision of the Common-

wealth, a grant recipient of Urban Mass Transportation Administration (UMTA), and operating element of the Department of Transportation, the Authority appears to be unquestionable. There appears to be an obligation on the part of the MBTA to take affirmative action. As a public instrumentality awarding construction contracts, it would seem also that the Authority is competent to make findings with respect to underrepresentation of minorities and discrimination against them in contracting and construction.

The Sufficiency of These Findings.

The Set-Aside Provision must have been adopted as a remedy for identifiable and identified past discrimination; otherwise it would not serve a compelling state interest. The plaintiffs insist that no clear competent findings of past racial discrimination were made.

Mr. Justice Powell, who wrote the "majority" opinion in *Bakke*, wrote the concurring opinion in *Fullilove et al.* v. *Klutznick, Secretary of Commerce, et al.*, ____ U.S. ____ (July 2, 1980). At page 3 of the concurring opinion (slip opinion), we find:

> [T]his Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations.

Mr. Justice Powell went on to state that "a rac
scious remedy" is not compelling unless appro
governmental authority has found that a violati
occurred. He adds that such body must make fi
that demonstrate the existence of illegal discri
tion. "In *Bakke*, the Regents failed both requirer
They were entrusted only with educational fun
and they made on findings of past discrimir
Thus, no compelling governmental interest wa
ent to justify the use of a racial quota in medical
admission."

The defendants insist that, in this particular ca
Set-Aside Provision is premised on competent
ings of past discrimination. Defendants stat
"[N]umerous legislative and administrative
charged with the responsibility have made findi
discrimination against minorities in the constr
industry." Defendants' Brief, p. 50. Defendants
that Congress as a whole and its committees hav
findings of past discrimination against minorit
tractors in the construction industry. The Hous
committee on SBA Oversight and Minority Bu
Enterprise, say the defendants, specifically has
fied racial discrimination in the government co
field. Defendants remind the court that Mr.
Powell recognized that an administrative body cl
with the responsibility could make findings suf
to validate remedial preferences. At page 54 o
Brief, they write that federal executive depart
with broad mandates have made pertinent find

discrimination, pointing to the Office of the Assi
Secretary for Equal Opportunity of the United S
Department of Housing and Urban Develop
Finally, they say that the MBTA itself is an adn
trative body charged with the responsibility for m
findings of past discrimination. With this last co
tion I am in agreement. DOT regulations, pr
gated under Title VI of the Civil Rights Act of 19
fine this responsibility in 49 C.F.R. §21.5(7), 3
Reg. 10080 (1970), as amended by 38 Fed. Reg. 1
(July 5, 1973).

Defendants rely also upon "judicial findings
cluding the decision of the First Circuit Cou
Appeals in *Altshuler, supra.* Defendants contend th
Altshuler decision, in and of itself, is a valid predica
the racial classification here at issue.

> A public agency is entitled to rely on such judi
> cial findings of discrimination by a court in im
> plementing an affirmative action program C
> *Southern Illinois Builders Association* v. *Ogilvie*, 47
> F.2d 680, 683-84 (7th Cir. 1972).

Defendants' Brief, p. 58.

I note immediately that *Altshuler* concerns er
ment rather than contracting, although one mu
cede the discrimination in that case was within th
struction industry.

I cannot accept the proposition offer
fendants that they may rely upon findin
nation made by others: legislative or jud
does provide a framework for study of
but it must be read in the context of *Bak*
interpreted by *Fullilove, supra.* I rule, th
every affirmative action program of thi
be scrutinized individually. If the prog
scrutinized individually, the actor or enu
program must make its own findings.
others are not sufficient support to cons
onstrate a compelling state interest.

Did the MBTA make clear, competer
past racial discrimination as a basis for t
Judge Freedman, in his Memorandum an
March 14, 1978, described the "Report a
the Chairman", referred to herein as
which was prepared a year after the emb
policy in the Minority Provision. Repe
sidered the Report an after-the-fact atte
the decision. He was not satisfied, nor
"Final Recommendation of Compliance
the light of its conclusory and argument
am impressed particularly by the arg
plaintiffs to the effect that the MBTA its
way of any investigation or study, make
nations with respect to the availability of
tractors for the proposed work, whether
tractors were the victims of constitution
discrimination in the award of MBTA co

reason based upon findings for the adoptio
Set-Aside Provision. The defendants poin
port", as the decision of the MBTA C
appears that the Chairman personally di
who prepared the Report, nor who compil
mation contained in it. At any rate, the Re
May 4, 1977, and the Set-Aside policy h
nounced almost a year before by the MB

My answer then to the threshold qu
whether the Set-Aside Provision served
state interest, is in the negative, since it wo
been adopted as a remedy for identified p
nation. The necessary findings of illegal
tion did not exist. This conclusion will be
an Order granting the plaintiffs' motion f
judgment.

The Appropriateness of the Program.

One cannot answer definitively whethe
ular program provided the means for re
crimination in a permissible manner, la
findings made by a competent person.

However, if I were to find compelling
on the record presented, I would be able
that the 30% Set-Aside Provision was re
lated to the general goal of eliminating di
and facilitating reasonable minority partic
award of contracts by the MBTA. Plaintif

justification for setting the perce
necessarily depend upon the avai
subcontractors qualified to do th
and Decision concluded that the 3
pation "should be achieved with
may not, be correct. A summary o
Sandra Kay Gibbs, Assistant Secr
tive Office of Transportation anc
Susan Chan Egan of the State Offi
ness Assistance, on May 30, 19
attached to Memorandum in Su
Motion.), indicates that there i
whether the goal could actually be
of the specialized work required
Plaintiffs argue that, therefore, the
vision is "unreasonable" and "unc
the percentage quota decided upo
foundation of available minority s
fied to do the work, but also un
non-minority subcontractors. Def
a burden falling on non-minoritie
strated, and even if it does exist, it
tributed throughout the subcontr
a group that may fairly be asked
tiffs insist, in argument, that adop
vision was not the result of findi
negotiations between the MBT
ments of the black community. Th
tiffs, was strictly the result of c
agree. The MBTA has used statist

use of the percentage formula. The
that the Authority used statistics r
of investigation or fact-finding o
statistics from other sources wh
poses, and have used those statisti
gram adopted. It should be noted
centage goals as appropriate rem
crimination is not constitutionally
cuit and others have deemed p
employment appropriate remedies
See Altshuler, supra. Assuming the co
est, the means chosen to implem
interest must be reasonably relate
Altshuler, supra, 490 F.2d at 18. A pre
group over another is sought to b
to equalize current opportunities.
ing a factual determination prior t
program must be adopted which
reasonably related to the achiever
The Equal Protection Clause requ
in other words, must be tailore
Shevin, 416 U.S. 351 (1974). Failu
quirement constitutes failure to i
burden."

The goal of the MBTA was to set
dollar value of construction work
It is true, in the case at bar, as de
the Provision does not exclude an
contractor from any opportunity
capacity to aspire. The relevant i
non-minority subcontractors. The
Defendants in Support of their M

Judgment, p. 78.) used as
Census, which demonstra
tion firms constituted on
firms. Using the 1972 bas
that total construction w
1972 and 1977, the MBT
that the sum total effect
minority contractors woul
portion of such constructi
99.5% to 99.4%. Defend
minority businesses have
having to compete agains
say that it is not inequitabl
competing for a relatively
during a short program.
tracting differs greatly f
sions. Once a student is ad
become an applicant again
tinuously seek and obtair
undeniable also, as pointed
the Court of Appeals in
"courts are ill equipped to j
ments, and that we shoul
in determining whether p
appropriate. The MBTA's
ticipation in 1977 was
minority population of t
appears, upon the inform
constitutional validity of
Provision is a reasonable
serve a laudable goal. If

state interest" requiremer
summary judgment in fav
reasonable relationship be

Plaintiffs' Procedural Due Proc

The plaintiffs do not s
that part of their claim for
gations that the procedu
awarding the contract den
of law. They concede that,
tried, they would necessar
dentiary nature with resp
by the MBTA. Defendant
are entitled to summary j
claims, asserting that the
prived of any "property" c
ed by the Due Process
Amendment. In this rega
ants. The plaintiffs have n
erty or property. *Board of*
(1972), stands for the pro
tion of the Due Process C
injury to either a liberty
plaintiffs suffered injury
them of a specific govern
does not implicate any
Process Clause. The plain
taking advantage of othe
rule also that there is no
tiffs of which they have k

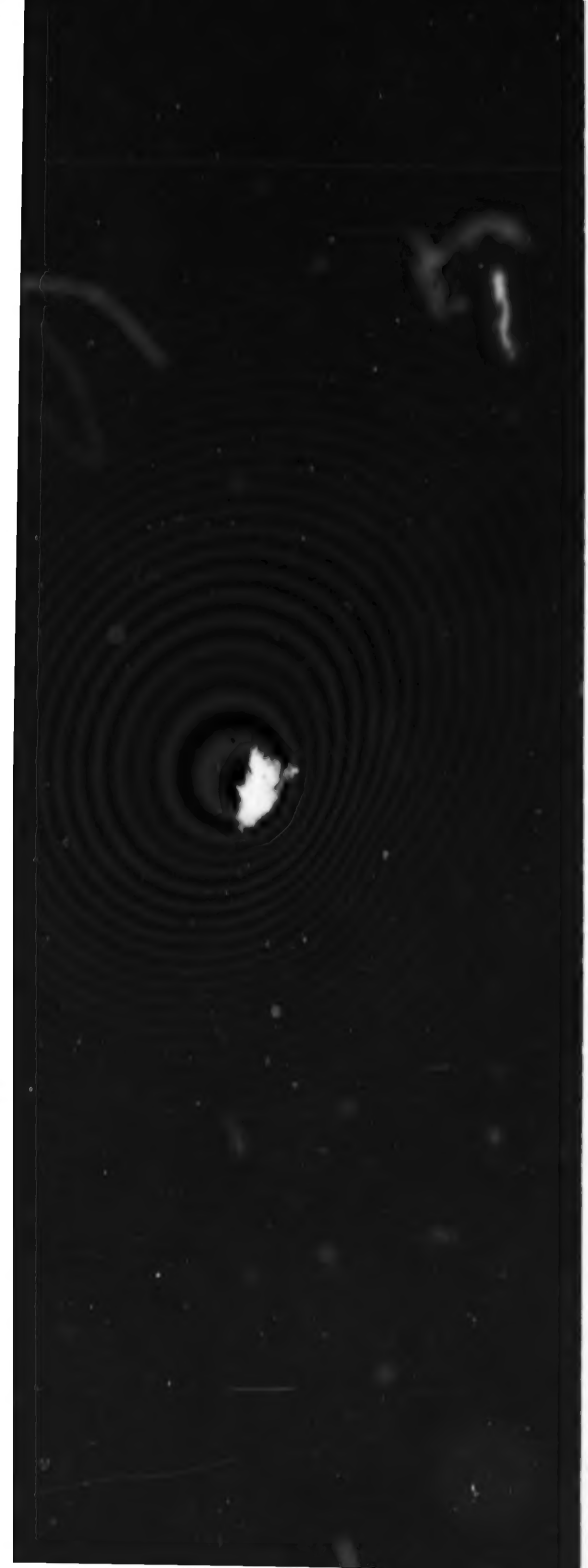
failure to obtain thi
chusetts law, a bic
award of a public c
complain if his bid i
substantive right. I
contract that he sho
stricted to the recov
Sardella Construction
Mass. App. Ct. Ad
Adv. Sh. (1976) 24
right to a contract
not have an interes
erty under the Du
426 U.S. 341 (1976

In light of the fo
as to whether the
were sufficient as

The defendants a
ment on the plaint

Damages.

Plaintiffs seek s
their rights under
Fourteenth Amer
Rights Act of 1964
ants, an award of
defendant MBTA
that, if they are e



factual issues whic
respect to the amo
are entitled to rec

The defendants
the MBTA and tl
that the MBTA is
munity under the
stitution because
affect the State
accept. It is a fact t
the Commonweal
imburse the MBT
borne a portion o
the MBTA is ther
or the lack of it w
whether or not th
deficit. If the plair
against the Autho
those damages sh
the bid.

Neither can I di
issue as to wheth
are immune fron
Since they are be
for alleged consti
may well be, as c
have a qualified i
sonal liability whe

Wood v. *Stri*
judgment r
of damage
applicable,
determinat
both the pl
regard. Ap
nature.

/s/ JOHN
UNITE

SEP 4 1981
ALEXANDER L. STEVA
CLERK

Nos. 80-2046 and 80-2057

In the Supreme Court of the United States

OCTOBER TERM, 1980

NEW ORLEANS PUBLIC SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

MISSISSIPPI POWER & LIGHT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether a public utility that sells its services to various agencies of the federal government is subject to the provisions of Exec. Order No. 11246 and implementing regulations.

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Section 202(5) .....
Section 209(a)(6) .....

In the Supreme Court of the Unit

OCTOBER TERM, 1980

No. 80-2046

NEW ORLEANS PUBLIC SERVICE, INC., PE

v.

UNITED STATES OF AMERICA

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MISSISSIPPI POWER & LIGHT COMPANY, P

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ON PETITIONS FOR A WRIT OF CERTIORAI
UNITED STATES COURT OF APPEA
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OP

OPINIONS BELOW

The opinion of the court of appeals in
2046 and No. 80-2057 (80-2046 Pet. Ap
80-2057 Pet. App. A1-A16) is reported
899. The opinion of the district court in
(80-2046 Pet. App. 1a-28a) is reporte

Supp. 705. The opinion of the district
80-2057 (80-2057 Pet. App. B1-B4)
reported at 20 Fair Empl. Prac. Cas. (1

An earlier opinion of the court of a
80-2046 (80-2046 Pet. App. 165a-215a
at 553 F.2d 459. An earlier opinion o
appeals in No. 80-2057 is reported at
The initial opinion of the district cou
2046 (80-2046 Pet. App. 100a-162a)
reported at 8 Fair Empl. Prac. Cas.
The initial opinion of the district cou
2057 is unofficially reported at 10 Fai
Cas. 1084.

JURISDICTION

The judgment of the court of appeal
on March 6, 1981. The petitions for a
rari were filed on June 3, 1981. The
this Court is invoked under 28 U.S.C. 12

STATEMENT

1. Section 202 of Exec. Order No. 1
Reg. 12319 (1965), as amended by Ex
11375, 32 Fed. Reg. 14303 (1967), re
federal government contracts include
hibiting the contractor from discrimi
ployment on the basis of race, color, r
national origin, and requiring the cont
affirmative action to ensure that appli
ployed, and that employees are treat
ployment, without regard to their race,
sex, or national origin" (see 80-2046
56a). Section 201 of the Executive O
Pet. App. 53a) directs the Secretary
"adopt such rules and regulations a
orders as he deems necessary and
achieve the purposes" of the Order.

The Secretary has issued a re
60-1.3; 80-2046 Pet. App. 73a) th
ment contract as "any agreem
thereof between any contracting
son for the furnishing of supplie
The term 'service' * * * includes
the following services: Utility
tary's regulations also provide th
of the Order, the equal opportu
considered to be part of every
contract required by the order
* * * to include such a clause
physically incorporated in such co
or not the contract between the
tractor is written." 41 C.F.R.
Pet. App. 84a.

Both the Executive Order itself
ing regulations require a contra
Secretary access to information
the contractor's compliance. Sec
Executive Order requires a co
access to his books, records, a
contracting agency and the Sec
purposes of investigation to ascer
[the] rules, regulations, and or
Secretary]" (see 80-2046 Pet.
regulations provide (41 C.F.R. 6
App. 85a):

> Each * * * contractor *
> cess during normal business
> for the purpose of conducti
> reviews and inspecting and
> records, accounts, and other
> relevant to the matter und
> pertinent to compliance w

Order and the rules and
gated pursuant thereto *
obtained in this manner sh
connection with the adminis
the administration of the
1964 (as amended) and in
purposes of the Order and

2. a. Petitioner in No. 80-
Public Service Inc. (NOPSI), is
sells electric power to consumers
the Mississippi River in New
and distributes natural gas to c
New Orleans (80-2046 Pet. App.
natural gas and electricity pursu
by the City Council (*ibid.*). It
with permits to supply New Orle
and to supply the east bank of th
(*id.* at 103a-104a). Consumers
obtain electricity only from NO
natural gas only from NOPSI o
where NOPSI has specifically ag
pliers through pipelines built
NOPSI (*ibid.*).

Federal agencies in New Orl
chasers of utilities from NOPS
105a-118a). In 1973, NOPSI
$2,680,000 from the federal g
services (*id.* at 114a). Nine
paid NOPSI more than $10,00
services from 1965 to 1973
Federal agencies, like other c

---

[1] The largest user is the Michoud
National Aeronautics and Space Ad
approximately $1.4 million for utili
2046 Pet. App. 106a-107a).

monthly and pay for the
(*id.* at 119a).

NOPSI supplies 22 fed
under written agreement
133a); six other federal
ties under less formal a
Although some of the wr
cuted before October 24,
Exec. Order No. 11246, a
rate schedules in 1973
133a).[2] Nevertheless, nor
expressly contains the n
quired by Exec. Order N
NOPSI refused to sign a
cause it contained that
128a, 131a, 140a).

In 1969, the federal g
conduct a review of NO
its compliance with Ex
2046 Pet. App. 136a-13
General Services Admini
its conclusion that the e
quired by Exec. Order
all NOPSI contracts wit
the contracts were writ
Pet. App. 143a). In Ju
Labor, through the Offic
pliance (OFCC), concur
it had determined that

---

[2] The Executive Order ap
of contracts entered into be
60-1.3, 80-2046 Pet. App. 7
tion 209(a)(6), 80-2046 Pet

[3] A few of the agreem
clauses required by earlier E
Pet. App. 120a, 121a, 122a.

tractor subject to the Ex
144a).

NOPSI informed the
not permit a review to de
the Executive Order (80-
The United States then
States District Court fo
Louisiana. It sought an i
to comply with the Exe
access to NOPSI's premis
whether NOPSI was in c

b. Petitioner in No. 8(
Light Co. (MP&L), is a
the Mississippi Public Se
electricity in a large pa
Mississippi (*United Sta
Light Co.*, 10 Fair Emp
1085 (1975)). MP&L
electricity in that part
of its franchise, it must
requesting it, including
(*ibid.*). MP&L concedes
alternative source of
States v. *Mississippi Po*
480, 481 (5th Cir. 1977)).

MP&L has written ar
furnish electrical service
to federal agencies at 1
Fair Empl. Prac. Cas. (1
of the written contracts
effective date of Exec

---

[4] One contract—that for
Court House—was executed
Executive Order (10 Fair E
The contract proposed by th
opportunity clause required

have been amende
date (*ibid.*).[5] Nor
contains the equal
Executive Order.

The governmen
in 1972 and 1973
views (10 Fair E
1088). Although
MP&L by letter t
subject to the p
MP&L denied the
on the ground th
with the terms
regulations (*id.*
then sued in t
for the Southern
as it had against
MP&L to comply
obtain access to
determine whethe
Pet. App. A3).

3. In each cas
utility company t
to the requirem
(80-2046 Pet. Ap
(BNA) at 1091)
from "[f]ailing o
Order 11246," sp
the utilities perm
tent of their con

MP&L returned th
posed contract, MP&
which did not conta
vision for access to

[5] See note 2, *supra*

their premises an
164a; 10 Fair E
Both district cou
determine the ext
the Executive O
Fair Empl. Prac.

The court of a
decisions, modify
the injunctive ma
cause "the enforc
be better carried
pliance agencies"
United States v.
F.2d 480, 484 (5t
Exec. Order No. 1
idential power un
ministrative Servi
and Title VII of
U.S.C. 2000e *et s*
see 553 F.2d at 4
district courts' fi
government contr
were therefore su
though they had
by it (80-2046 Fe
483). Finally, th
the utilities' pape
the Fourth Amer
195a; 553 F.2d
NOPSI and MP&L
government contr

---

[6] The court cautio
faith negotiations be
cided herein are pr
2046 Pet. App. 202a

sent[ed]" t
Pet. App. 1
Judge Cl
"neither ut
the meanin
App. 212a)
and MP&L
supply util
within thei
irrespective
rangements
stances of
tomers, not
(*id.* at 211
that both t
regulations
at 204a n.1
This Cou
writ of cer
further con
Inc., [436
Service, In
The court
trict courts
the Supren
Public Ser
1978). Ea
decision, a
Pet. App.
ing jurisd
could be er
The util
peals reaf
Order and
the utilitie

441 U.S. 281 (1979), called these conclusions into question (80-2046 Pet. App. 37a-42a). The court held, however, that the district courts had not fully analyzed the Fourth Amendment question. It eschewed reliance on implied consent (*id.* at 43a-44a) and remanded for further findings on the question whether the inspections were reasonable within *Marshall* v. *Barlow's, Inc.*, *supra*. Specifically, the court of appeals ruled that while the inspections were properly authorized by law and sufficiently limited in scope, the district courts should have "examin[ed] * * * how the agency chose to initiate th[e] particular search[es]" to determine whether the agencies were following "reasonable" or "neutral" criteria (80-2046 Pet. App. 46a). The court also invited the district courts to consider "other questions relevant to the reasonableness of the proposed search under the fourth amendment" (*id.* at 47a).

ARGUMENT

1. Petitioners contend (*e.g.*, 80-2046 Pet. 14-23; 80-2057 Pet. 8-12) that Exec. Order No. 11246 is not a valid exercise of presidential authority. For several reasons, this contention is incorrect. Moreover, this is not an appropriate case for the Court to decide this important question.

a. In 1941, President Roosevelt issued the first Executive Order barring discrimination by government contractors, and every President since has continued that prohibition in some form. See 80-2046 Pet. App. 178a-180a; *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 168-171 (3d Cir.), cert. denied, 404 U.S. 854 (1971). Even petitioner NOPSI acknowledges that Con-

gress has not repudiated this 40-year-old, consistent presidential practice (see 80-2046 Pet. 20). Every appellate court that has considered the question has held that the President has the authority to apply Exec. Order No. 11246 to government contractors. See *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra; Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3 (3d Cir. 1964); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Southern Illinois Builders Association* v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *EEOC* v. *AT&T*, 556 F.2d 167, 175 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Uniroyal* v. *Marshall*, 579 F.2d 1060 (7th Cir. 1978); *St. Regis Paper Co.* v. *Marshall*, 591 F.2d 612 (10th Cir. 1979); *AFL-CIO* v. *Kahn*, 618 F.2d 784, 790-792 (D.C. Cir.), cert. denied, 443 U.S. 915 (1979).[7]

One statutory source of presidential authority for Exec. Order No. 11246 is the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 *et seq.* That Act deals with, among other things, government procurement of services; in particular, it is intended to establish an "economical and efficient system for * * * the procurement * * * of * * * services" (40 U.S.C. 471(a)). The Act empowers the President to "prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of [the] Act * * *" (40 U.S.C. 486(a)). As the

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[7] *Liberty Mutual Insurance Co.* v. *Friedman*, 639 F.2d 164 (4th Cir. 1981), on which petitioners rely, is not to the contrary. See note 12, *infra*.

Third Circuit explained, Exec. Order No. 11246 directly promotes the Act's objectives (*Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra*, 442 F.2d at 170-171):

> [I]t is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen. * * * In direct procurement the federal government has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects.

Moreover, employment discrimination is now illegal under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Court has recognized that a firm's engaging in illegal employment discrimination can increase its costs; "[f]or example, when a company complies with a backpay award resulting from a finding of employment discrimination in violation of Title VII * * * it pays twice for work that was performed only once." *NAACP* v. *FPC*, 425 U.S. 662, 668 (1976). Even the possibility of litigation can increase an employer's costs. Similarly, discrimination, like other unfair employment practices, is "a prolific cause of [industrial] strife" (*NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937)) that can disrupt a contractor's business. By impairing morale and dissipating good will, as well as by causing more obvious forms of disruption, discriminatory practices can increase an employer's costs. Thus Exec. Order No. 11246 promotes efficient and economical procurement by requiring government contractors to

avoid an important potential source of wasteful ar unnecessary costs.[8]

Congress ratified Exec. Order No. 11246 and i predecessors when it enacted Title VII in 1964, ar again when it amended Title VII in 1972. For e ample, Congress integrated the Executive Order e forcement program into the scheme it designed enforce Title VII. Title VII provided (42 U.S. (1970 ed.) 2000e-8(d)):

> * * * Where an employer is required by [t predecessor of Executive Order 11246], * * * by rules or regulations issued thereunder, to fi reports relating to his employment practic with any Federal agency or committee, and is substantially in compliance with such requir ments, the [Equal Employment Opportunity Commission shall not require him to file add tional reports * * *.

The 1972 amendments provided for other feder agencies to exchange information with the EEO and designated the Secretary of Labor as a memb of the Equal Employment Opportunity Coordinati Council (see 42 U.S.C. 2000e-8(d), 2000e-14); t purpose of the Council was to improve coordinati between the Executive Order enforcement progra

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[8] In addition, courts have indicated that the Federal Pr erty and Administrative Services Act authorizes the Pre dent to attempt to eliminate employment discrimination wi out directly linking that objective to the cost or quality goods. *Rossetti Contracting Co.* v. *Brennan*, 508 F.2d 10 1045 n.18 (7th Cir. 1975); *Northeast Construction Co. Romney*, 485 F.2d 752, 760 (D.C. Cir. 1973). See also *Libe Mutual Insurance Co.* v. *Friedman*, *supra*, 639 F.2d at 172-1 (Butzner, J., concurring in part and dissenting in part).

and the EEOC (see 118 Cong. Rec. 13
(1972)).[9] As even petitioner NOPSI appears
cede (see 80-2046 Pet. 20), nothing in Title V
amendments was intended to repudiate the E
Order program. For example, in 1972 Cong
jected an effort to make Title VII the exclus
eral remedy for employment discriminatio
Alexander v. *Gardner-Denver Co.*, 415 U.S. 3
(1974); Senator Williams, the floor manager
1972 amendments to Title VII, explained (11
Rec. 3372 (1972)):

---

[9] Petitioner NOPSI cites (80-2046 Pet. 18-19) C
deletion of a provision that would have expressly a
the President to "take such action as may be appr
against "unlawful employment practice[s] * * * in
tion with the performance of a [government] contra
but NOPSI quotes only a small portion of the de
plaining Congress's action. The colloquy engaged in
resentative Celler, who offered the amendment,
demonstrates that Congress intended to endorse the
order program (110 Cong. Rec. 2575 (1964)):

> MR. CELLER. And will the gentleman not
> that the deletion of the language by the amendn
> not have any effect upon existing Presidential
>
> MR. POFF. Of course, the striking of langu
> a bill could not in any way impair existing law.
>
> MR. CELLER. And it does not limit it and
> broaden it. It remains intact as it is now.
>
> MR. POFF. That is true.
>
> * * *
>
> MR. QUIE. Even though I support this am
> is it not true that the President has this autho
> now, judging from actions being taken by the
> of late?
>
> MR. CELLER. The President has the author

The House then adopted the amendment.

> Mr. President, this amendment can be bar enforcement of the Government compliance program, at least, in part. believe that the Senate would do that the votes we have taken in the past 2 to to continue that program in full fo effect.

b. In *Dames & Moore* v. *Regan*, No. (July 2, 1981), slip op. 19-20, the Court sta even if a statute does not "directly author presidential action, "we cannot ignore the tenor of Congress' legislation in [an] area i to determine whether the President is acting at least with the acceptance of Congress. * * enactment of legislation closely related to t tion of the President's authority in a partic which evinces legislative intent to accord th dent broad discretion may be considered to 'measures on independent presidential respo *Youngstown* [*Sheet & Tube Co.* v. *Sawyer*], [579,] 637 [(1952)] (Jackson, J., concurri least this is so where there is no contrary i of legislative intent and when * * * there is of congressional acquiescence in conduct of engaged in by the President."

At the very least, Exec. Order No. 1124 predecessors fit this pattern. Congress has to the President broad authority in the procurement (see page 11, *supra*). Since 1 ing a period of intense legislative activi area of civil rights, Presidents have with tion asserted the authority to prohibit disc among government contractors. Congres aware of the Executive Order program and indicated a desire to abrogate it; on the

Congress has indisputably accepted it
the Executive Order program is speci
ized by statute (see pages 11-15, *supra*
it is not, it clearly represents " 'a system
executive practice, long pursued to the
Congress' " and a " 'long-continued p
to and acquiesced in by Congress * *
Moore v. *Regan*, *supra*, slip op. 28, qu
town Sheet & Tube Co. v. *Sawyer*, *su*
at 610-611 (Frankfurter, J., concurrin
States v. *Midwest Oil Co.*, 236 U.S. 45
For these reasons, Exec. Order No. 1
the President's authority.

It is true that this case, unlike *Da*
does not involve the President's power i
tions. But the Court has long recogni
concerning government procurement,
less dramatic than foreign affairs, are
unfit subject for judicial intervention.

---

[10] For example, Senators Clark and Case
sponsors of Title VII, offered a memorandum
VII (see *International Brotherhood of Tea*
States, 431 U.S. 324, 351-352 (1977)), in w
(110 Cong. Rec. 7215 (1964)):

> The President's Committee on Equal
> portunity was created by [predecesso
> Order 11246]. * * * It presently superv
> tration of an equal employment oppo
> with respect to * * * contractors and s
> construction financed with Federal fin
> Title VII, in its present form, has no
> sponsibilities of the committee or on t
> sessed by the President or Federal ager
> ing law to deal with racial discriminat
> of Federal Government employment a
> tracts.

straint of those who administer
purchasing would constitute a b
judicial practice * * *." *Perkins* v.
310 U.S. 113, 127-128 (1940); see,
v. *Stake*, 447 U.S. 429, 439 n.12 (1
utive is to be supervised in this a
of Congress to do so. See *Perkins* v.
supra, 310 U.S. at 128-130. Accor
consistent acceptance, and ratific
standing executive practice, engage
grant of discretion, is entitled to g

c. Finally, this is not a suitable
to consider the validity of Exec.
The Executive Order is concerned
contractors' employment practices;
sions are designed to give effect
quirement that contractors not d
petitioners have chosen to challeng
early stage, before their employme
been specifically drawn into questio

For at least two reasons, the Cou
sider a challenge to the Executiv
case is in this posture. First, b
employment practices have not be
record lacks information that s
Court's decision on the validity

---

[11] For this reason, petitioner NOPSI
Order and its implementing regulation
tional "race and sex conscious remedi
11-14) plainly does not warrant revie
have been imposed on NOPSI. In any
ment in support of this contention is es
of its view that the Executive Order (
regulation incorporating it in all gove
at 14) exceed the authority of the Ex

Order. For example, the fact
practices in a particular area
illustrate the connection betwee
inefficiency in government pr
Contractors Association of Eas
Secretary of Labor, supra, 442
Liberty Mutual Insurance Co. v
169, 170 (4th Cir. 1981).

Second, particularly in deali
presidential authority, the Cou
* * * the very questions necess
case" (*Dames & Moore* v. *Rega*
Only two issues are necessarily
at this time: the validity of the
tioners permit compliance inspec
of certain administrative obli
duty to examine their employme
mit a report on them (see 41 C.
on petitioners by virtue of the
that the Executive Order applies
objection to the compliance insp
review at this time. See
While petitioners contend gener
subject to the Executive Orde
cifically complained about any
requirements imposed by the
menting regulations; thus no ot
been brought into focus by the
even if petitioners were to obj
istrative requirements, the Pr
impose such requirements on g
in order to gather information
ment practices is even clearer
regulate those practices; the re
to determine whether certain

interfere with objectives, st
omy, that he is authorized t

2. Petitioners' principal
are not subject to the Exe
have never agreed to be bo
tack the validity of 41 C.F
vides that the equal opp
incorporated in governmen
exceptions not relevant he
physically incorporated in s
or not the contract * * *

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[12] Petitioners' assertion that
with *Liberty Mutual Insuranc*
incorrect. In *Liberty Mutual,*
President lacks the authority t
to certain employers who are w
ment *subcontractors*—in partic
vided workers' compensation i
tractors, when that insurance
worked on government contra
639 F.2d at 171). The court c
which the Executive Order wa
tractors—including the court o
ent case—noting that in such c
between the efficiency and eco
Property and Administrative
tions imposed on federal contr
* * * is more readily surmise
shown in relation to the insura
the instant case" (*id.* at 170-1
Circuit, while caviling at some
Circuit's decision in this case (
25), expressly distinguished
this case on the ground that "
* * * a sufficient efficiency/eco
plication of the Executive
demonstrable" here (639 F.2d
Thus there is no reason to b
would reach a different result

Pet. 6-10; 80-2057 Pe
without merit. Given
Order, it is entirely co
and its statutory bases
it.

The courts below agr
ments with the gove
within the meaning o
e.g., 80-2046 Pet. App.
conclusion is clearly co
cally define an agreem
as a contract subject t
80-2046 Pet. App. 7
with the government
modified after the effe
a modification of an
definition of a contract
of Congress suggestin
defined in this way.

Petitioners' refusal t
by the order is irrelev
status of government c
that they also explicitl
defines that status.
enforceable clauses tha
included in a contract
explicitly agree to the
& Co. v. *Seamans*, 45
1971); *G.L. Christia*
States, 312 F.2d 418,
Russell Motor Car Co
514, 524 (1923); *De*
United States, 284 U
Boat Corp. v. *United*
There is no reason to
the President and hi

corporating boilerpla
instead of by issuin
petitioners were able
only because they a
reason to believe that
President, and his
advantage in dealing
the court of appeals
190a), petitioners' "
local legislative actio
Constitution obvious
bination of private ac
nullifying the Preside
dealing with governm

It is also irrelevan
tioners to supply uti
tioners voluntarily a
Congress could not h
ment contractors to e
expedient of placing
to some third party,
ment.[13]

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[13] Petitioners rely hea
U.S. 281 (1979). *Chrys*
of the phrase "authorize
18 U.S.C. 1905. It hel
"authoriz[ation] by law
"conform with any proc
gress" and "are reason
statutory] grant of auth

Chrysler Corp. does
tack on the Executive
regulations. *Chrysler*
Trade Secrets Act; the
specifying standards fo
tive Branch actions in
n.40. Indeed, it is whol

3. Finally, pet
spections of their
Pet. 23-29; 80-2

---

ler Corp. established
ing the Trade Secret
idential power in all
presidential power
Dames & Moore v.
Tube Co. v. *Sawyer*,

For the reasons w
valid exercise of pre
dent may enforce the
all the details himse
Labor the authority
like those challenge
the Executive Orde
alone and unaided c
cute them by the
Valeo, 424 U.S. 1, 13
272 U.S. 52, 117 (19
(1959) (plurality op

In any event, eve
Trade Secrets Act c
eral, they are met h
Labor challenged by
procedures specified
5 U.S.C. 553 (80-20
plain in the text, th
the purposes of the
Congress. If the Ex
tractors who did no
istrative burdens b
* * * a dilemma u
would [either] hav
necessary services'
government could n
have no way of kn
Executive Order.
authorized by Con
have the requisite
which are the basi

that these obj
the Executive
(see 80-2046
already answ
valid exercise
tion provisio
determining v
their obligati
that petitione
rests on the
review at this

The court o
of whether th
within the m
instructed the
whether the i
ant to an a
neutral crite
Marshall v. *B*
but it noted

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[14] Petitioner
this assertion.
complained abo
statutory autho

[15] Similarly,
authority to su
Order (80-2057
the United Sta
specific authori
United States,
52 U.S. (11 H

[16] The Court
if it were base
or on reasonal
conducting a
Pet. App. 46a)

other questions relevant to the reasonableness of the proposed search * * *." (80-2046 Pet. App. 47a). The district courts had not previously considered the question of reasonableness, since they appeared to conclude that the inspections were not within the Fourth Amendment. It would be inappropriate for this Court to consider that question in the first instance, particularly when, because of the district courts' approach, the record on the question of reasonableness has not been developed.

Moreover, in remanding the case the court of appeals suggested that *Marshall* v. *Barlow's, Inc.*, *supra*, "may have cast doubt on * * * the implied consent concept" (80-2046 Pet. App. 44a) that it had relied on when it first heard the case (see 80-2046 Pet. App. 193a-195a) and that at least one district court had invoked on remand (see 80-2057 Pet. App. B3). But since the court of appeals' decision, this Court has decided *Donovan* v. *Dewey*, No. 80-901 (June 17, 1981), in which it said that the Fourth Amendment may not require a warrant when a search is prescribed as part of a regulatory program "and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes" (slip op. 5-6). In this respect, *Donovan* cited and followed *United States* v. *Biswell*, 406 U.S. 311 (1972), where the Court held that "[w]hen a [gun] dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection" (*id.* at 316).

Petitioners have entered into contracts with the government under terms that expressly subjected them to inspections; this is an even clearer form of consent than that shown by one who enters a pervasively regulated business or accepts a federal license. Thus, under *Donovan* v. *Dewey* and *Biswell*, petitioners' assertion that the inspection violates the Fourth Amendment appears to be incorrect. In any event, on remand the district courts will have an opportunity to consider the consent issue in light of *Donovan*. Until they have done so, and their decisions are reviewed by the court of appeals, this Court should not decide whether the proposed inspections comply with the Fourth Amendment.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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